No. 206.

Brief of Fletcher for D. E.

Filed Dec. 14, 1898.

IN THE

Supreme Court of the United States

H. F. AUTEN, as Receiver of the First National Bank of Little Rock, Ark.................Plaintiff in Error,

v. No. 206.

UNITED STATES NATIONAL BANK, of New York.........................Defendant in Error.

Brief for Defendant in Error.

JOHN FLETCHER,
Attorney for Defendant in Error.
W. C. RATCLIFFE,
Of Counsel.

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v. **No. 206.**

UNITED STATES NATIONAL BANK, of New York. . . . . Defendant in Error.

Brief for Defendant in Error.

This action was brought by the United States National Bank of New York, against the First National Bank of Little Rock and Sterling R. Cockrill, its receiver, to enforce the liability of said First National Bank of Little Rock as an indorser of five promissory notes. For convenience, the two banks above mentioned will be referred to hereafter as the "New York Bank" and the "Little Rock Bank." Three of the said notes were in the following form:

"$5,000. Little Rock, Ark., December 7, 1892.

"Four months after date we or either of us promise to pay to the order of G. R. Brown and H. G. Allis $5,000 for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Ark., with interest from maturity at the rate of 10 per cent per annum until paid.

CITY ELECTRIC STREET RAILWAY CO.,

H. G. Bradford, *President.*"

The three notes aforesaid, when received for rediscount by the New York Bank, bore the following indorsements:

"G. R. Brown.
"H. G. Allis.
"First National Bank, Little Rock, Ark.
"H. G. Allis, President."

Two of the said five notes were in the following form, except that one was made payable five months after date instead of four months after date:

"$5,000. Little Rock, Ark., December 7, 1892.

"Four months after date we or either of us promise to pay to the order of James Joyce $5,000 for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Ark., with interest from maturity at the rate of 10 per cent per annum until paid.

McCARTHY & JOYCE CO.,
Geo. Mandlebaum, *Sec. & Treas.*

The notes last aforesaid when received for rediscount by the New York Bank, were indorsed as follows:

"James Joyce.
"H. G. Allis.
"First National Bank, Little Rock, Ark.
"H. G. Allis, President."

Business relations between the New York Bank and the Little Rock Bank were inaugurated in pursuance of the proposition contained in the following letter, written by the second assistant cashier of the New York Bank to the cashier of the Little Rock Bank, to-wit (Tr., p. 16):

"New York, June 21, 1892.

"*W. C. Denney, Esq., Cashier, Little Rock, Ark.*:

"Dear Sir—Can we not do business with your good bank? We should like to enroll your name upon our books, and we think the relation, if once established, could be made satisfactory to you in every particular, at any rate it would be our

earnest endeavor to make it so. We will give you 2 per cent on your daily balances, granting you our best collection facilities, taking all your foreign items east of the Mississippi River and crediting them to your account immediately without charge. If you will send on $50,000 of your good, short time, well-rated bills receivable, we will be pleased to place them to your credit at 4 per cent. We are anxious to do business with your bank, having warmly and favorably known of it, and should be pleased to hear from you in reference to the above proposition.

Yours very truly,

J. W. HARRISON,

Second Assistant Cashier."

The Little Rock Bank, through H. G. Allis, its president, acknowledged the receipt of this communication by letter dated June 24, 1892, accepted the offer and transmitted to the New York Bank notes amounting to $50,728 for rediscount, which were accepted by the New York Bank. The proceeds were placed to the credit of the Little Rock Bank and it was at once notified of the fact by telegram and also by letter which contained a list of the notes, amount of discount, etc. On July 6, 1892, the New York Bank telegraphed the Little Rock Bank offering to take $50,000 more of its "short time, well-rated bills, discounted at 5 per cent." This offer was on the same day accepted by the Little Rock Bank by telegram, and on July 9 H. G. Allis, as president of the bank, forwarded by letter notes amounting to $50,301.88, which were rediscounted by the New York Bank, and the Little Rock Bank was duly notified thereof. On July 26 the New York Bank again telegraphed the Little Rock Bank saying: "Can take $50,000 more of your well-rated bills, discounted at 5 per cent." On July 29, Allis, as president, wrote the New York Bank accepting this offer and inclosing notes amounting to

$51,124.93, which were rediscounted by the New York Bank, and of which the Little Rock Bank was duly notified. On October 31, 1892, W. C. Denney, as cashier of the Little Rock Bank, forwarded to the New York Bank by letter notes amounting to $24,413.05, to be discounted for the purpose of renewing notes maturing in November; these notes were rediscounted by the New York Bank, of which due notice was given the Little Rock Bank by telegram and by letter (Tr., pp. 16-25). In all this correspondence a list of the notes forwarded by the Little Rock Bank was contained in the letter transmitting them, and the New York Bank likewise described each note rediscounted by it in each letter notifying the Little Rock Bank of the same, and frequently returned notes for the purpose of correction.

On November 25, 1892, W. C. Denney, cashier, wrote to the New York Bank the following letter:

The First National Bank,
of Little Rock, Ark.,
November 25, 1892.

"*United States National Bank, New York City*:

"Gentlemen—Kindly advise us if you can give us $25,000 more in discounts. We have not decided whether we will make more discounts this year, although it is more than probable that we will have to, as our cotton men do not want to sell at present.

"We believe the advance in price will cover shortage of crop, and that our collections will be equal to those of last year. If our cotton men continue to hold their cotton, it will be necessary for us to make further rediscounts, and we want to know what we can do in case they refuse to sell.

"If you can grant us this favor, kindly let us know what rate of interest you will want. Your immediate reply is requested. Yours very truly,

W. C. DENNEY,
Cashier."

To which the New York Bank replied as follows:

"New York, November 28, 1892.

"*Mr. W. C. Denney, Cashier, Little Rock, Ark.*:

"Dear Sir—Yours of the 25th is to hand. We will give you the additional discounts as requested. You may send on your paper, and we will put same to your credit at 6 per cent.

Yours very truly,

H. C. HOPKINS,

Cashier."

On December 13, 1892, H. G. Allis, as president, wrote the following letter:

"Little Rock, Ark., December 13, 1892.

"*United States National Bank, New York City*:

"Gentlemen—In accordance with our letter of the 28th ult., we find that we shall need some more money, as our cotton men are not shipping out any cotton. It seems to be the inclination of all of them to hold for a better price, and we are now carrying $175,000 in demand loans on cotton, which we may have to carry two or three months longer.

"We inclose herein paper as scheduled below. Kindly wire us proceeds to our credit, and oblige.

H. G. ALLIS,

President."

Dickinson Hardware Company, due March 3.....	$2,500.00
Dickinson Hardware Company, due April 6......	5,000.00
City Electric Street Railway Co., due April 10....	5,000.00
City Electric Street Railway Co., due April 10.....	5,000.00
City Electric Street Railway Co., due April 10....	5,000.00
McCarthy & Joyce Company, due May 10........	5,000.00
McCarthy & Joyce Company, due April 10......	5,000.00

"We hold collaterals recited subject to your order and for your account."

To which the New York Bank replied as follows:

[Registered.]

"New York, December 16, 1892.

"*H. G. Allis, Esq., President, Little Rock, Ark.*:

"Dear Sir—We have this day discounted the following notes contained in your favor of the 13th inst., and proceeds of same are placed to your credit:

		Dis't.
Dickinson Hdw. Co., due March 3, '93..	$2,500.00	$ 32.08
Dickinson Hdw. Co., due April 6, '93...	5,000.00	92.50
City Elec. St. Ry. Co., due April 10, '93.	5,000.00	95.83
City Elec. St. Ry. Co., due April 10, '93.	5,000.00	95.83
City Elec. St. Ry. Co., due April 10, '93.	5,000.00	95.83
McCarthy & Joyce Co., due April 10, '93,	5,000.00	95.83
McCarthy & Joyce Co., due May 10, '93.	5,000.00	120.83

Amount of notes...............	$32,500.00
Less discount at 6 per cent.,......	628.73
Proceeds	$31,871.27

"We inclose herewith note of Dickinson Hardware Company, $5,000, due April 6, for insertion of amount in body and return to us.

Yours truly,

JNO. J. McAULIFFE,

Assistant Cashier."

And also sent the following telegram:

"New York, December 17, 1892.

"*First National Bank, Little Rock, Ark.*:

"Letter thirteen received; notes discounted; proceeds credited account.

UNITED STATES NATIONAL BANK."

On December 20, W. C. Denney, as cashier, wrote the New York Bank as follows:

"The First National Bank,
of Little Rock, Ark.,
December 20, 1892.

"United States National Bank, New York City:

"Gentlemen—We have your favor of the 16th inst., inclosing the Dickinson Hardware Company note for completion, which we herewith return.

"We charge your account with $31,871.27, proceeds of $32,500 of discounts.

Yours very truly,

W. C. DENNEY,

Cashier."

To which the New York Bank replied as follows:

"New York, December 23, 1892.

"Mr. W. C. Denney, Cashier, Little Rock, Ark.:

"Dear Sir—Your favor of the 20th inst., inclosing note of the Dickinson Hardware Company filled in, as requested in ours of the 16th, duly received.

Yours very truly,

JNO. J. McAULIFFE,

Assistant Cashier."

(Tr., pp. 25-27.)

The three notes of the City Electric Street Railway Company, and the two McCarthy & Joyce Company notes, each for $5,000, mentioned in the letters quoted, are the notes now in suit.

On December 21, 1892, Allis, as president, telegraphed the New York Bank, asking that bank to discount $30,000 more paper, which the New York Bank agreed to by telegram of same date, addressed to Allis as president. In answering to this, Denney, as cashier, on the same day wrote the New York Bank inclosing notes amounting to $30,000, which were discounted by the New York Bank, and of which the Little Rock Bank was duly notified, as usual (Tr., pp. 28, 29).

These were all the rediscounts made by the two banks. But from the beginning of business between the two banks, they had the usual business transactions with each other, incident to such relations; the Little Rock Bank sending the New York Bank remittances for its credit almost daily, and continually checking on the New York Bank, until the Little Rock Bank failed February 1, 1893 (Tr., pp. 12, 29, 44).

At the trial plaintiff, in addition to the foregoing facts, showed that it acquired the notes in the due course of business and without notice of any fraud or want of power on the part of the officers of the Little Rock Bank. That the proceeds of the notes were credited to that bank, and paid out in checks regularly drawn by the officers of said bank (Tr., pp. 10, 16).

The defendant showed that the notes never belonged to the First National Bank; that the three notes of the Electric Street Railway Company were executed to Brown and Allis for accommodation of Allis, and the two notes of McCarthy & Joyce Company were executed and delivered to Allis for the purpose of raising money for the company to be placed to its credit with the First National Bank, to which McCarthy & Joyce Company was indebted; that neither of the notes was ever passed upon by the discount board of the bank or appeared on the books of the bank; that after the bank was notified that the notes had been discounted and placed to its credit, Allis directed the proceeds of the notes ($25,000) to be placed to his credit on the books of the bank, at which time there was an overdraft against him of $10,679.44; that Allis was at that time indebted to the Little Rock Bank on individual notes for at least $50,000, and was continuously thereafter indebted to the bank until its failure (Tr., p. 64).

The case has been three times tried before the circuit court at Little Rock, and before the Court of Appeals for the Eighth Circuit. In the first the trial court directed a verdict for the defendant, on the ground that the individual indorsement of Allis preceding that of the Little Rock Bank was sufficient to put the New York Bank upon notice that Allis was acting without authority. This was reversed by the court of appeals (64 Fed. Rep., 985).

At the second trial the trial court again directed a verdict for the defendant, on the ground that rediscounting is equivalent to borrowing money within the meaning of the opinion in Western National Bank *v.* Armstrong, 152 U. S., 346. This was again reversed by the court of appeals (79 Fed. Rep., 296).

At the third trial the trial court, in accordance with the last opinion of the court of appeals, directed a verdict for plaintiff. This was affirmed by the court of appeals, and the receiver has brought error to this court.

The jurisdiction of this court to entertain the writ of error is called in question by motion to dismiss, which has heretofore been argued and is now under advisement by this court.

ARGUMENT.

I.

The case of the Western National Bank v. Armstrong, 152 U. S. 336, is not applicable to the ca e at bar.

Counsel for plaintiff in error, at the threshold of this case, takes the position that rediscounting is borrowing of money within the meaning of the opinion of this court in Western National Bank *v.* Armstrong, 152 U. S., 346, and that this is controlled by that case. We submit that that case is not applicable here, because:

(*a*). The cases differ radically in their facts.

(*b*). The *dicta* in that case, on which counsel bases his argument, rest upon a mistaken assumption of fact.

Differences in facts:

(1). There the two banks were strangers. Here they had long been correspondents, the Little Rock Bank keeping a deposit account with the New York Bank with a regularly established course of business.

(2). There the transaction was a borrowing of money, pure and simple, and Harper, in requesting the loan, did not ask it on behalf of his bank. Here the transaction was a rediscount of paper purporting to belong to the Little Rock Bank. The request for the rediscount was expressly made on behalf of that bank by W. C. Denney, its cashier, and the transaction consummated by H. G. Allis, its president, with the knowledge and approval of Denney, the cashier.

(3). There no obligation of the Fidelity Bank was transmitted with the request, but only notes signed by A. P. Gahr, and certificates of stock in the Fidelity Bank, both indorsed by Harper individually, the transaction bearing the form of an individual matter. Here notes bearing the indorsement of the Little Rock Bank were sent by Allis, as president, in accordance with a previous arrangement with that Bank, for its credit.

(4). There the record contained no evidence as to the custom or usage of banks in borrowing money or rediscounting paper, nor as to the scope of the powers usually exercised in such transactions by the officers of banks. Here the record shows that it was usual for banks to rediscount their paper and that this was usually done by the president and cashier, and that the transaction in this case was such as is usual for the president and cashier to carry on (Tr., pp. 12, 13).

(5). There the record was silent as to the powers exercised by Harper other than that he was vice president and managing officer, *i. e.*, the general manager of the business of the bank. Here the record shows that Allis was permitted to manage the affairs of the bank very much as he saw fit; that the question of rediscounting paper was never presented to the board of directors, but that Allis directed when and where rediscounts were to be made, and that he and the cashier, acting under his orders, attended ~~alluded~~ to the same without regard to the board; that Allis had in all the previous transactions of like nature with the New York Bank except one (Tr., p. 24), transmitted the notes for rediscount; that the notes in question were rediscounted not only in accordance with a previous request

of the Little Rock Bank made by its cashier, but were transmitted by Allis in accordance with the previously established and usual course of business between the two banks.

(6). There all the letters from Cincinnati were signed by Harper individually; the letters from New York were addressed to Harper as vice president. Here all the correspondence from Little Rock in reference to this and previous transactions was on behalf of the bank and signed either by Allis, as president, or by Denney, as cashier, and of those relating specifically to the paper in controversy, Denney, as cashier, wrote the first requesting the rediscount, Allis, as president, wrote the next in "*accordance with*" the letter written by Denney and the letter of the New York Bank in reply thereto, and Denney, as cashier, wrote the last confirming the rediscounts of the notes sent in the letter written by Allis.

(7). There the loan made by the New York Bank was drawn out by false drafts not appearing on the books of the Fidelity Bank. Here the proceeds of the rediscounts were drawn out by regular drafts appearing upon the books of the Little Rock Bank, in the regular course of business and for the purposes of that bank.

(8). There the amount borrowed was $200,000, as the court said "enormous." Here the amount was small, but little more than half the amount of previous rediscounts.

There are other differences between the two cases which will be referred to in the further argument of the case.

That case has not met with the approval either of the bench or the bar, and the courts where it has been relied on

have confined its application strictly within the facts, as disclosed by the opinion in the case.

Davenport *v.* Stone (Mich.), 62 N. W., 722.

Diltty *v.* Dominion Nat. Bank of Bristol, Va., 75 Fed., 769.

Chemical Nat. Bank *v.* Armstrong, 76 Fed., 339.

Armstrong *v.* Chemical Nat. Bank, 83 Fed., 556.

We have been favored with the very able and exhaustive brief of Judge William Worthington, of the Cincinnati bar, who represented the Chemical National Bank in Armstrong *v.* Chemical National Bank, 83 Fed., 556, in which he reviews the Western National Bank case, and while the case argued by Judge Worthington was one of borrowing money, that part of his brief in reviewing the Western National Bank case is so applicable here, we take the liberty to copy it as a part of our brief in this case. He said:

"*Dicta rest on mistaken assumption.*—The following quotations from Western National Bank *v.* Armstrong, 152 U. S., 346, 350, give fairly, I think, the essential parts of that opinion bearing upon the power to borrow money:

" 'There is no evidence whatever that the board of directors of the Fidelity National Bank gave any authority to Harper to borrow money on behalf of the bank, much less to borrow so enormous a sum on so long a time.' * * * 'The most that can be claimed in this case is that Harper acted as the principal executive officer of the bank. It cannot be pretended that, as such, he had power, without authority from the board, to bind the bank by borrowing $200,000 at four months' time.

" 'It might even be questioned whether such a transaction would be within the power of the board of directors.'

"The court then quotes from the eighth section of the National Banking Act (Rev. Stat., sec. 5136, par. 7), and continues:

" 'The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted.'

"Then, after quoting from First National Bank *v.* National Exchange Bank, 92 U. S., 122, 127, a passage showing that by necessary implication a bank has power to incur liabilities in the regular course of its business, the court continues:

" 'Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.

" 'Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity National Bank to borrow $200,000 on time, it is yet obvious that the vice president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally as obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers.'

"The conclusion thus reached by the court rests, it will be seen, entirely upon the premise stated by it, that: 'The business of the bank is to lend, not to borrow, money; to discount notes of others, not to get its own notes discounted.' Upon this foundation is built the superstructure, first, that the temporary borrowing of money is 'out of the course of ordinary and legitimate banking;' and, secondly, that special authority is essential to validate such a loan. If the major premise, the foundation of the argument, be unsound, the whole structure falls.

"I yield to no one in respect and reverence for the Supreme Court of the United States. And far be it from me to urge upon a tribunal inferior in the judicial hierarchy to disregard a decision of that court upon a matter of law. But when it comes to questions of fact, the situation is altered. Even Homer nods; and while the Pope of Rome claims infallibility, this is only when speaking *ex cathedra* on matters of faith. To follow out the simile just suggested, the Supreme Court of the United States, when giving judgment in law upon a matter presented by the record, is, so far as inferior courts are concerned, infallible in its declarations of law. But this

does not cover its expressions of opinion upon matters of law not presented by the record, and still less its statements as to matters of fact. Such statements are conclusive only as to the particular case in which they were made. However positively asserted, they are never more than persuasive in other cases; they cannot be conclusive upon another tribunal in such manner as to prevent it from seeing a manifest error disclosed by further illumination of the subject.

"Not to multiply illustrations of a proposition so self-evident, I call attention to but two, and those noteworthy instances taken from the decisions of the supreme court itself.

"During the first fifty years of this government, it was assumed that the ebb and flow of tide was essential to the existence of admiralty waters. This rested, in its essence, upon a question of historical fact, namely, what was the scope of admiralty and maritime jurisdiction as known and understood in the United States when the constitution was adopted. In course of time, the supreme court, though it had early and repeatedly limited admiralty jurisdiction to tide waters, was driven to re-examine the question from an historical point of view, and upon such re-examination to conclude that all waters were admiralty waters which served for more than merely local commerce. The Genessee Chief, 12 How., 443; The Moses Taylor, 4 Wall., 411; The Hine *v.* Trevor, Ibid, 555; *Ex parte* Garnett, 141 U. S., 1.

"For over a hundred years it had been supposed, and had been stated in numerous decisions, that taxes upon income were, when the constitution was adopted, considered as indirect taxes. But when the whole subject was re-examined in the debate over the income tax enacted by the act of August 15, 1894 (28 Stats. at Large, 509), with a thoroughness of research that had never before been given, it became manifest that this assumption of fact was erroneous, and that when the constitution was adopted, income taxes were recognized to be, as logically and in truth they could not but be, direct taxes and not indirect.

"Pollock *v.* Farmers Loan and Trust Company, 158 U. S., 601.

"What is embraced in the business of banking is a question of fact, not of law. Its solution depends upon the usage of bankers, what they are habitually or commonly accustomed to do. This is different from the question as to what may be

the powers of any particular bank. The latter will depend upon whether the bank be created by statute, or by private agreement between individuals, or be the property of but one person, and will involve questions of law as to the interpretation of such statute or agreement. But *the banking business* means the business transacted by banks generally, no matter how created; and what that business is, depends simply and solely upon what banks are accustomed to do. Whether any particular bank can do everything germane to the banking business depends upon the charter or other constating instrument creating that bank.

"It will be observed that the supreme court in the Western National Bank case does not find any limitation upon the borrowing power imposed in terms or by implication by the National Banking Act. It rests its conclusion solely upon the ground that borrowing is not incident to the banking business, or, to use the words of the court, is 'out of the course of ordinary and legitimate banking.' This is simply and purely a question of fact. Its existence is not affected nor conclusively disproved by a statement in the opinion of any court, no matter how weighty or deserving of respect the pronouncements of that court may be. One seeking to learn what is, in truth, within the course of ordinary and legitimate banking, will not rest with the assertion of any one man or any one tribunal, but will test that assertion by examining the nature of the business and the manner in which it is actually done; what history tells us as to how it has been done in the past; and what judicial opinions show us has been heretofore considered incidental or usual in that business.

"To the sources of information just suggested I shall now turn, and with their aid I expect to show that the supreme court was mistaken in matter of fact, when it said that the business of a bank is to lend and not to borrow money, and that borrowing money is out of the course of ordinary and legitimate banking. And if I shall succeed in impressing this truth upon the court, then I submit that no rule exists which compels the court to shut its eyes to the truth, and to adhere to a mistake of fact made by another, and blindly follow the lead thus set as if such mistake did not exist."

"AUTHORIZATION PRESUMED.

II.

Temporary borrowing is within the course of ordinary and legitimate banking.

"As a rule, wherever money is to be used in a business, there the borrowing of money is incidental to that business. Because of this the doctrine is well settled that all commercial corporations have an implied power to borrow money. For their business cannot be transacted without money, and all means of securing it must necessarily be considered as given. Hence, in Morawetz on Corporations, sec. 342, it is said:

" 'Corporations have implied authority to borrow money and incur debts for the purpose of accomplishing their legitimate purposes, unless the contrary be expressly provided. * * * Some kinds of corporations, like banks, must borrow money daily, in carrying on their ordinary affairs; in other cases, the business of a corporation may not require it to borrow except under extraordinary circumstances. But it may be stated as a general rule, that every corporation has implied authority to borrow money whenever the borrowing of money is a reasonable method of carrying out the purposes for which the company was chartered.'

"And in 4 Thompson on Corporations, sec. 5697, it is said:

" 'It is believed to be in conformity with all judicial holdings to say that every corporation, except those organized for public or governmental purposes, which may require the use of money for carrying out the purposes of its organization, has an implied or incidental power to borrow money for such purposes, although no such power is expressly granted in its charter, and to give the customary evidences of debt therefor, and to add to this the customary security.'

"The doctrine thus asserted by the text writers has been affirmed by the Supreme Court of the United States, in Railroad Company *v.* Howard, 7 Wallace, 392, 412, in the following words:

" 'Private corporations may borrow money, or become parties to negotiable paper in the transaction of their legiti-

mate business, unless expressly prohibited; and until the contrary is shown, the legal presumption is that their acts in that behalf were done in the regular course of their authorized business.'

"When the nature of the banking business is considered, it would be strange indeed if this doctrine did not apply to it in full force and vigor; for what is that business? It is indicated by the terms of characteristic usually attached to the word 'bank;' that is to say, banks are spoken of as banks of issue, deposit, exchange, or discount. Some one of these features an organization must have, to be a bank at all; usually, at the present time at least, all of them, except the function of issue, are exercised by all banks.

"Let us analyize these terms and see what they connote.

"A bank of issue is one that sends out its promissory notes payable on demand, for value given to it in money or credit; in other words, it is a borrower of money payable on demand.

"A bank of deposit is one which receives the money of others as a loan; if the deposit be general, it agrees to repay the money in sums as and when demanded; if the deposit be special, it agrees to return the money as a whole when demanded. It will be observed that I have not used the phrase 'special deposit' as signifying the bailment ordinarily meant by that term where the particular thing deposited is to be returned, but as signifying that kind of a deposit which is represented ordinarily in banking by a certificate of deposit. Deposits in the banking business are never special in the sense in which that word is used in the law of bailments; for the title to the money deposited passes to the bank, and it becomes the debtor of the depositor. Deposits, whether general or special, may or may not bear interest, according to the custom of the particular bank. Here also, the bank is a borrower of money.

"A bank of exchange is one which apparently sells credits upon other places. It really, however, borrows from the person, to whom it issues its exchange, money payable through its correspondent upon the presentation of the exchange. Its profit in the transaction arises not merely in the premium it may charge for the exchange, but in having the use of the money without charge from the issue of the exchange until its presentation. So here again the bank is a borrower of money. Of course this transaction has ordinarily its reciprocal side,

for a bank of exchange buys, as well as sells, exchange; that is to say, it pays money out for a credit to be paid at some other place, as well as receives money in for giving such credit.

"A bank of discount purchases credits in the form of written obligations, giving in return money, or money's worth, in the shape of counter credit.

"Thus we see that in every branch of the banking business, except the buying of exchange and the discounting of notes, borrowing money is the essential feature. While banks have been known which confined themselves to being banks of discount, yet there have been but few of them; and such an organization would not readily present itself to the mind as suggested by the word 'bank.' That word ordinarily calls up the idea of a bank carrying on the three principal operations in which all banks of modern times engage, *i. e.*, deposit, discount, and exchange. Most essentially is this true with reference to incorporated banks; for such a creation limited to discounting only would be foredoomed to failure. If a bank had for its resources for discount only the capital its owners put into the business, the expenses of maintaining the bank would so eat into the profits that failure, in the sense of nonsuccess, would be certain. It is not by virtue of their own capital, but by using the capital lent to them by others, in other words, by their deposit accounts, that banks are able to make money in discounting paper. Hence it is not true to say: "The business of the bank is to lend, not to borrow, money.' On the contrary, the statement should be: 'The business of the bank is to borrow, that it may lend, money.'

"The profits in banking, as stated, are from lending money. To enable banks to lend money with profit, they must borrow. At some times and in some places the money borrowed by the banks from their depositors can all be lent again to their customers. But this is not always the case. At times more money is deposited, that is to say, lent to the bank, than it can lend again to those doing business with it; in such case, the money borrowed by it must lie idle or seek some other than the usual channel of use. At other times, the money deposited is not sufficient to meet the legitimate demand upon the bank for loans; in such cases, it must hire money elsewhere, or else forego a legitimate profit within its reach. The situations just depicted are not extraordinary, but normal, in certain places; that is to say, agri-

cultural communities have ordinarily a glut of money deposited in the banks, while manufacturing communities have ordinarily an excessive demand for loans from the banks—excessive in the sense that the demand for loans in a community exceeds the money deposited by that community. Again, in agricultural communities in this country, as is well known, there is a certain season when the amount of money there circulating is insufficient to transact the business; at that season, known as the time for 'moving crops,' the banks in agricultural communities must seek other funds than those lent to them by their own depositors. Hence it comes about that banks in the regular, ordinary, legitimate course of their business have occasion to borrow, and do borrow, money from other banks. At one point the demand for money is slight; at another it is great. The bank at the latter borrows from the bank at the former, and the equilibrium is restored. This borrowing may be by giving what is primarily the obligation of the borrowing bank, or by rediscounting notes it has already discounted. In either case, the result is the same. Money is borrowed which the borrowing bank obligates itself to repay.

"To say, therefore, that borrowing money is not a legitimate part of the banking business, is utterly to misconceive the nature of that business. The very breath of a bank's life depends upon its power to borrow money. That power failing, either from legal disability or from financial distrust, the bank is doomed. Able to borrow, it is able to lend again and to make money. How it borrows and whence it borrows are not material; it matters not whether it borrow on deposit credited to the lender upon its books, or on its note or indorsement which the lender takes with him, or on its assurance, written or verbal, that the money will be repaid; all come to the same end. The essence is, the bank must borrow that it may lend again.

"*Present Usage.*—Thus far I have considered the subject from our common knowledge as to the nature of the banking business. I shall turn now briefly to the evidence appearing in this record.

(Here reference is made to the evidence in the case.)

"This evidence—and more like it is contained in the record—is, as before stated, utterly without contradiction. And it is confirmed by information to be gathered from the reports of the Comptroller of the Currency to Congress,

which, though they are not embodied in the record, will receive judicial notice because they are reports of a principal executive officer made to Congress pursuant to law (Rev. Stats. of U. S., sec. 333; Heath *v.* Wallace, 138 U. S., 573, 584). On page 115 of volume 1 of the Comptroller's report, made December 4, 1893, is given a consolidated statement of the conditions of national banks on October 3, 1893, from which it appears that the notes and bills discounted in reserve cities other than New York, Chicago, and St. Louis, as shown by the returns to the Comptroller, amounted on that day to $3,137,-972, and the bills payable to $10,556,104; and that in the national banks not in reserve cities the notes and bills rediscounted then amounted to $17,928,765, and the bills payable to $16,628,834. On pages 254-275 of the same report will be found consolidated statements of the national bank returns to the Comptroller of the Currency for every year from 1863 to 1893, inclusive. Prior to 1869 notes and bills rediscounted, and bills payable, were not separately itemized, but in that year this separation began; and it will be seen that thereafter the amount of each item was never less than one million, and was generally several millions. During the years 1886 and 1887, which I choose because nearest to the transaction in question, the amount of notes rediscounted range from $7,556,837.10 to $17,312,806.39; and the bills payable from $1,145,240.26 to $5,105,112.57. The amount of these loans greatly increased, with some fluctuations, until in July, 1893, it came to more than sixty millions of dollars, which was in round numbers 10 per cent of the entire capital stock, 40 per cent of the entire circulation, 4 per cent of the entire individual deposits, and 3 per cent of the entire loans and discounts, of all the national banks then reporting. This statement alone seems sufficient to show that borrowing money otherwise than by circulation or deposit is a normal and usual feature of the banking business. It is a standing resource of which banks avail themselves, as a matter of course, where profit offers, or occasion justifies their so doing; of course it is not used to as great a proportion as either circulation or deposits, because its cost in the way of interest is greater.

"*Banking Literature.*—Probably the book of greatest value as to the practical side of the banking business is one originally entitled, 'A Practical Treatise on Banking,' but in more recent editions called 'The History, Principles, and Practice of Banking.' Its author is J. W. Gilbart, F. R. S., who was for many years director and general manager of the Lon-

don and Westminster Bank, one of the earliest and most important of the joint stock banks of London. It was originally published in 1829; but it has gone through many editions. This circumstance alone is testimony of the greatest weight as to its value. The edition from which I quote is that of 1882, revised by A. S. Michie, deputy manager of the Royal Bank of Scotland; it, as well as the other books of that class to which I shall refer, can be found in the Cincinnati Public Library. From it I quote as follows:

"Volume 1, page 13: 'The exchanging of money; the lending of money; the borrowing of money; the transmitting of money, are the four principal branches of the business of modern banking, and in most countries they seem to have taken their rise in the order in which they are here named.'

"Volume 1, page 23: 'That part of the business of banking which consists in the borrowing of money, with a view of lending it again at a higher rate of interest, does not appear to have been carried on by bankers until the year 1645, when a new era occurred in the history of banking. The goldsmiths who were previously only money-changers, now became also money-lenders. They became also money-borrowers, and allowed interest on the sums they borrowed.'

"Volume 1, pages 127, 128: 'Banking is a kind of trade carried on for the purpose of getting money. The trade of a banker differs from other trades, inasmuch as it is carried on chiefly with the money of other people.

" 'The trading capital of a bank may be divided into two parts: the invested capital and the banking capital. The invested capital is the money paid down by the partners for the purpose of carrying on the business. This may be called the real capital. The banking capital is that portion of capital which is created by the bank itself in the course of its business, and may be called the borrowed capital. * * *

" 'The profits of a banker are generally in proportion to the amount of his banking or borrowed capital. If a banker employ only his real or invested capital, it is impossible he should ever, in the ordinary course of business, make any profits. Bankers can seldom attain more upon their advances than the market rate of interest; and that may be obtained upon real capital, without the expense of maintaining a banking establishment. If, after deducting the expenses, the

profits amount to nothing more than the market rate of interest upon the invested capital, the bank may be considered to have made no profits at all. The partners have received no higher dividend upon the capital invested in the bank than they would have received if the same money had been laid out in government securities. To ascertain the real profit of a bank, the interest upon the invested capital should be deducted from the gross profit, and what remains is the banking profit.'

"Volume 1, page 190, speaking of the advantages of bills receivable over cash credits: 'If we discount bills of exchange, they can be rediscounted to supply the bank with funds, if necessary, but advances on cash credits cannot be replaced.'

"Volume 1, page 248: 'The rediscounting of bills of exchange is an operation of much importance, and has a great influence on the monetary operations of the country. We quote from a former work of our own, *i. e.*, "The History of Banking in America," upon this subject: "Banks situated in agricultural districts have usually more money than they can employ. Independently of the paid-up capital of the bank, the sums raised by circulation and deposits are usually more than the amount of their loans and discounts. Banks, on the other hand, that are situated in manufacturing districts, can usually employ more money than they can raise. Hence, the bank that has a superabundance of money, sends it to London, to be employed by the bill brokers, usually receiving, in return, bills of exchange. The bank that wants money sends its bills of exchange to London, to be rediscounted. These banks thus supply each other's wants, through the medium of the London bill brokers." '

"(It will be remembered that the bill broker in London is an intermediary between the borrower and the lender. In the cases referred to by the author, he is the chain of connection between the borrowing and the lending banks.)

"Volume 1, page 320, speaking of the conduct of the banker in times of pressure: 'If a banker has money lying at demand with a bill broker, he will now have occasion to call it in. If he has money lent at short periods at the Stock Exchange, he will, as he has occasion, take in the money as the loans fall due. If he has discounted broker's bills, he will receive the amounts when due, and discount no more. Should

these operations not be sufficient to meet the demands upon his funds, he will then sell his stock or exchequer bills, or borrow on them in the money market. A country banker who has kept his reserve in bills of exchange will be anxious to rediscount them, and will think himself lucky if he can do so readily and at a moderate rate of interest.'

"Volume 2, page 209, treating on the differences between the branch bank system of Scotland and the country bank system of England: 'The system of numerous branches enables the banks of Scotland to transfer the surplus capital of the agricultural districts to the manufacturing and commercial districts, without going through the process of rediscounting their bills.

" 'Some Scotch writers have considered it a reproach to the English banks that they rediscount their bills, and have boasted that the practice of rediscount is unknown in Scotland. The accusation is made without due consideration. The system of branches makes a difference in all banking arrangements. A bank in an agricultural district, say at Norwich, has a superabundance of money. A manufacturing town, say Manchester, has a demand for money. The bank at Norwich will send its money to a bill broker in London. The bank at Manchester will send its bills to the same broker. A rediscount takes place. But let us suppose that the bill brokering establishment should become the head office of a large bank, having one branch at Norwich and another at Manchester. Then no rediscount will occur. The bills discounted at Manchester will never pass out of the possession of the bank. Nevertheless, the surplus funds at Norwich will be transferred to meet the wants of Manchester as effectually as before. This is an illustration of the branch system in Scotland. A bank at Edinburgh will have branches in both the agricultural and the manufacturing districts. Or a bank whose head office is in a manufacturing town, will have branches in the agricultural districts. Thus the surplus funds of Perth, Ayr, and Dumfries are speedily transferred to be employed at Glascow, Paisley, and Dundee. Were a bank to be established at Glascow without branches, it would probably have occasion for discount at certain times, as well as the banks at Manchester or Leeds.

" 'At the same time, we think this transfer of capital by means of branches is better than by means of rediscount.

There is no occasion for the intermediate party, the bill broker. The bills do not go out of the bank, so that men's transactions do not become known. The abuses connected with rediscount by fictitious bills are effectually prevented, and the bank can more readily regulate its advances in accordance with its means. To recur to our illustration: The bank at Norwich may lose a large amount of its depositors; the bank at Manchester, knowing nothing of this, may continue its advances in dependence upon receiving its usual rediscount. The check may at length come so suddenly that the Manchester bank may be placed in difficulty. Under the branch system, should any large amount of deposits be withdrawn from one branch, the bank would immediately limit its advances at the others. The advantage of this system on the approach of a pressure is obvious.'

"In 1847, there was published in London a book called 'Capital, Currency, and Banking,' by James Wilson, Esq., M. P., being a republication of a series of articles printed in the 'Economist' in 1845 and 1847. I quote from article 3, page 26:

" 'As a general rule, the independent capital of bankers constitutes but a very small portion of the means upon which they trade. As we have before observed, bankers are rather the medium through whom the capital of others is lent and borrowed than dealers in their own capital. The private and independent paid-up capital belonging to banks may be looked upon rather in the light of a guarantee to the public for their security against the risk which it is known bankers must incur in the use of the deposits placed in their hands, than as constituting any very important portion of their means of trading.

" 'A banker being essentially, in the first place, a borrower of money, returnable on demand, the great art of his profession is to employ those funds in such a way as will at all times and under ordinary circumstances enable him to meet such demands.'

"Page 32: 'The practice of banks (in London) not allowing interest on deposits has at length changed the character of the bill broker to that of a banker, taking deposits (money at call), at a given rate of interest, from one man to lend it by discounting bills at a higher rate of interest to others. At the same time that he acts as a medium for transferring spare cap-

ital which accumulates with banks in one part of the country to those in other parts, where trade and commerce create a greater demand for it.'

"Also from article 4, page 36: 'The business of a banker is to borrow and lend.'

"G. M. Bell, secretary of the London Chartered Bank of Australia, has published a little book called 'The Philosophy of Joint Stock Banking.' I quote from the second edition, published in 1855, from chapter 10, entitled, 'On Rediscounting.'

"Page 67: 'A bank whose capital is either not commensurate with its business, or which has been imprudently invested, becomes dependent, in a large measure, upon its resources by rediscounting.'

"Page 68: 'The official returns made by joint stock banks, show that numerous establishments in the manufacturing and mining districts possess very inadequate capital. The same fact is revealed by the large quantity of paper, bearing the indorsement of these banks, constantly afloat in the money market.'

"After arguing against the inadvisability of habitually rediscounting, he says, page 69: 'These observations are not intended absolutely to discountenance or throw entire discredit upon the practice of rediscounting. * * * The dangerous length to which it is in many cases carried, forms the chief ground of its condemnation.

" 'It is well known that banks in the agricultural districts accumulate capital by deposits and circulation, for which they can find no other employment than by sending it to the London bill brokers, or investing it in the funds. It is equally well known that banks in the mining and manufacturing districts have demands upon them for accommodation out of proportion to their capital, which they cannot otherwise supply than by having recourse to the system of rediscounting with bill brokers. This latter class derive their profits from the difference of interest on the money borrowed and lent between the banks in this way. The borrowing bank, therefore, pays an extra charge, which by a different arrangement might be avoided, and both parties be equally well accommodated. The arrangement here suggested is that one bank should lend direct to another without the intervention of a

broker. The bank that borrows money from its depositors at 2 per cent could very profitably lend to its neighbor at 2½ or 3 per cent, more or less, in proportion to the ever-changing value of money.'

"In 1885 there was published by John Murray, of London, the second edition of a book called 'The Country Banker, His Clients, Cares, and Work, from an Experience of Forty Years,' by George Rea, author of 'Bullion's Letters to a Bank Manager.' I quote from page 218:

" '*Rediscounting.*—The rediscount, or sale of a portion of its bills, is often an important feature in the financing of an English country bank.'

"The author then proceeds to state some of the objections to this practice, and continues:

" 'But the objections which apply to banks having ample resources within themselves do not apply to banks placed in districts of great industrial activity, where deposit money is scarce and the demand for loan capital is great. There is nothing opposed to sound banking principle in banks thus placed supplementing their resources by rediscounting portions of their bills, and thus drawing supplies from the London market. A bank, by this process, merely transfers that portion of its discount business to London which is in excess of its local means to meet it.'

"Mr. Walter Bagehot, in 'Lombard Street' (edition of 1873, published by Scribner, Armstrong & Co., N. Y.), says, page 243:

" 'A banker's business—his proper business—does not begin while he is using his own money; it commences when he begins to use the capital of others.'

"On page 285 he quotes from the testimony given by Mr. Richardson in 1810 to the Bullion Committee of Parliament, as to the nature of an agency for country banks: ' "It is twofold: in the first place, to procure money for country bankers on bills when they have occasion to borrow on discount, which is not often the case; and in the next place, to lend the money for the country bankers on bills on discount. The sums of money which I lend for country bankers on discount are fifty times more than the sums borrowed for country bankers." '

"On page 287 Mr. Bagehot says: 'For the most part agricultural counties do not employ as much money as they save; manufacturing counties, on the other hand, employ much more than they save; and therefore the money of Norfolk or of Somersetshire is deposited with the London bill brokers, who use it to discount the bills of Lancashire and Yorkshire.'

"In the ninth edition of the Encyclopaedia Britannica, under the title 'Banking,' will be found the following:

" 'Bankers may borrow money on call, at deposit, on debentures, at interest, or without interest, and they may lend on open credits, by discounting bills by advances repayable in installments or otherwise, etc.

" 'Discount banks and discount agencies borrow money on call or deposit, and lend it exclusively in the discount of bills and negotiable securities, which they often rediscount with capitalists desirous of investing their money in forms capable of being speedily realized.'

"Turning now to a work published in this country, I call attention to 'The Methods and Machinery of Practical Banking,' by Claudius B. Patten, of Boston, Mass., published in 1891. From the preface, it appears that Mr. Patten had been for twenty years, prior to 1867, connected with the Suffolk Bank of Boston, and that in that year he became cashier of the State National Bank of that city, where he continued until his death in 1886. It will be remembered in reading the extracts made from his work, as well as the other quotations above, that there is no substantial difference between the credit here given by the Chemical Bank and hiring deposits by paying interest; the essential features of the two transactions are the same; in each case the borrowing bank makes a call loan on which it agrees to pay interest.

"On page 69, when speaking of returns by banks to governments, he says:

" 'Then another—a return of the condition of the Bank of Moscow (see Form 11)—which I obtained in London, and to which I call attention for the purpose of showing that the drift of the banks of this country toward a habit of paying interest upon deposits is nothing new in banking—that it is everywhere in Europe a common thing with stock banks.

" 'This practice, which I personally observed in London, extends from London to Moscow.'

"A statement of the Moscow Discount Bank is added, from which it appears that with a capital of 4,000,000 roubles, its time deposits, over one-third of the whole, exceeded 3,000,-000, and its bills rediscounted exceeded 1,000,000, its total liabilities being 16,730,287.56 roubles.

"On page 355 he gives this statement as to the clearing house loans which were such a feature in the case of the Merchants Bank *v.* State Bank, 10 Wallace, 604:

" 'LOANS BETWEEN BANKS AT CLEARING.

" 'In some of our clearing house cities, notably in Boston, the banks are in the habit of borrowing of each other, as their situation may demand, immediately after they have made their morning settlements. These negotiations are, of necessity, made by the representatives of the banks who are present at the clearing. And these representatives are mainly the messengers and settling clerks of the banks, though it has of late years become the custom with many banks to be present at these morning after-clearing negotiations in the person of their cashier.

" 'This custom has been in existence for at least twenty years, and the aggregate of loans of this class made there daily is very large, ranging from hundreds of thousands to millions of dollars. I have known many instances where banks, which have emerged from the morning settlements with gains of more than a million, have before leaving the clearing house, scattered these entire gains in loans among losing banks—loans negotiated on both sides by single representatives of the banks, and those often junior clerks. There is nothing of this sort done in the European clearing houses.

" 'I found the London bankers interested and astonished to hear that we indulged in financial transactions of this character.

" 'The loans made at clearing are loans of minute money. They are rarely secured by deposit of collateral of any sort.

" 'The bank receiving the accommodation draws upon the lending bank a check in its usual form. The loan is

charged to it; and, when it is repaid, the lending bank settles the transaction by simply drawing upon the debtor bank for the amount.

" 'The current rates for these loans are usually about 1 per cent under those charged upon standard call loans to private bankers and merchants. This is because they are loans for large round sums, ranging say from ten thousand to hundreds of thousands of dollars, and because the money thus advanced is understood to be immediately available in the form of clearing house funds.'

"On page 406, he says:

" 'SHALL NATIONAL BANKS BECOME DEALERS IN MONEY?'

" 'Shall national banks become dealers in money, or shall they simply bank upon the capital furnished them by their shareholders, unhired depositors, and bill-holders? There is no banking question of the period of more vital interest than this, and none which is being more actively discussed.

" 'There is no doubt but that some of the most successful banks in the United States—banks which have paid the largest kind of dividends, and which to-day show a heavy surplus and a current business of the most profitable character—are those which have been run upon a moderate share capital and large interest-paid deposits. These banks have bought money in all directions, paying comparatively heavy prices for it, and have sold the same at a very slight advance. Yet the magnitude of their transactions has so swollen their profits that their small capitals have reaped the largest remuneration. This is doing business on the London joint stock bank principle—a principle which has in London been worked with marvelous success. The leading London banks in question carry deposits, upon which heavy interest is paid, to the amount of from ten to twenty times their capital. Their dividends have for many years been enormous, and their shares to-day sell, in some instances, at two or three times their par value.

" 'Banks which deal in money to the extent which I have described and which carry the limited share capital, have need only of making a very small percentage on the money

they handle in order to earn a large dividend for their share capital. The motto of such institutions is large sales and small profits, yet the net results are most satisfactory.

" 'The risks of banking of this class are large. The management of the enormous loans, which is the critical feature of the business, demands extraordinary vigilance and caution, for a slight sweep in the wrong direction, where such heavy current investments are being made in notes, acceptances, and collateral loans, must at once wreck all prospects of dividends for stockholders.

" 'It must have been noticed by observing bankers that the drift of banking in the United States has of late been in the direction of an imitation of this English style of doing business. The great success which has marked the management of some of our largest trust companies—which have copied directly the London banking methods—has had much to do with leading the national banks into the habit of paying higher rates of interest upon deposits.'

"On page 381, treating of trust companies in this country, the author says:

" 'These trust companies scatter among the national banks around them (those banks that are willing to pay a liberal interest upon large, round demand deposits) such of their resources as are accumulating on their hands awaiting investment, or funds which they do not deem it prudent to place beyond their immediate reach.'

"I quote also from 'Practical Banking,' by Albert S. Bolles, published by the Homans Publishing Company, of New York, in 1884.

"On page 73, in discussing the powers of the cashier, he says:

" 'As the cashier is the ostensible executive officer of a bank, he is presumed to have, in the absence of positive restrictions, all the power necessary to transact its business. Thus, in the absence of restrictions, if he should procure a *bona fide* rediscount of any paper of the bank, his indorsement would bind it, because he has the implied power to transact such business.'

"On page 99, in speaking of the duties of the discount clerk, he says:

" 'Sometimes a bank will rediscount a portion of its notes with other banks. It may desire to get possession of more funds, in order to pay the demands of depositors, or through fear of an increased demand. In other words, the loans which it may have made are transferred to another institution.'

"*Judicial Opinions.*—Most of the cases wherein courts have found it necessary to treat of the borrowing powers of banks arose from abuse or misuse of those powers. Sometimes the money was borrowed by an agent whose power to act in the premises was disputed; sometimes the agent embezzled the money which was borrowed so that the bank never got the benefit of it. Cases of the kinds just suggested will be mentioned *infra* under other heads of this argument, and to them I refer without repeating here. But in three cases of great importance the court was confronted with the proposition that a bank had no power to borrow money unless expressly given by its charter. In each of these cases the nature of the banking business, and of the transactions incident to it, were examined; and to them I shall ask attention in some little detail.

"The first of these in time is the case of the Bank of Australasia *v.* Breillat, 6 Moore P. C. C., 152, decided by the Privy Council in December, 1847. The facts, so far as necessary to state them for our present purposes, were as follows: The Bank of Australasia was a partnership doing business at Sydney, in New South Wales. The Bank of Australia was a joint stock company incorporated under a special act, doing business at the same place; the defendant, Breillat, was the chairman of the Bank of Australia, and the nominal defendant, under statutory provisions, in suits brought against it. The deed of settlement, which constituted the charter of the Bank of Australia, put the control of its business in a board of directors, and it declared that business to be the discount and issue of notes and bills, the lending of moneys on securities, and cash accounts for the safe custody of moneys and securities for moneys, for general public accommodation and benefit, and transacting and negotiating all other matters usually connected with the ordinary business of banking; and by clause 54 it declared the board of directors should have entire control of the lending of money on bills, notes, etc., the purchase and sale of bullion, gold, and silver, and such coins and moneys as they might think necessary or advisable, and of calling in all moneys due the company. The Bank of Australia early in 1843, having become involved in difficulties, applied to the

plaintiff for assistance. This was given in the form of a loan of £154,000 sterling upon certain conditions involving, among other things, the winding up of the banking business of the Bank of Australia. In October, 1843, the Bank of Australia gave its demand note for the sum thus lent. In August, 1844, the shareholders in the Bank of Australia declared this note was not binding on that bank, and instructed the directors to defend any action brought to recover on the same. Thereafter this suit was brought upon the note. The committee of the Privy Council who sat in judgment were Lord Brougham, Lord Langdale, Lord Campbell, Dr. Lushington, and T. Pemberton Leigh. The opinion of the committee was delivered by the latter. Having stated the facts and the issue, and described the nature of the powers given to the board of directors, he continues, page 193:

" 'The effect, we think, is to confer on these directors all the powers of managing partners in ordinary partnerships of a similar character, unless there is something in the subsequent clauses of the deed restricting those powers.

" 'First, then, is the power of borrowing money for the purposes of the partnership, one of the powers which belong to a partner in ordinary banks? And, secondly, if so, is there any restriction expressed, or to be inferred, from the deed?'

"Then, having quoted with approval sections 124 and 125 of Story on Agency as to the powers of partners, and having shown that borrowing money for partnership purposes is unquestionably one of those powers, he continues, page 194: 'Then, is the nature of a banker's business such as to exclude the power, from want of occasion of its exercise? Quite the contrary. The nature of a banker's business, especially if the bank be one both of issue and deposit, necessarily exposes him to sudden and immediate demands, which may be to the extent of a large proportion of his debts, while his profits are to be made in employing his own moneys and those intrusted to him in discounting bills, in loans, and other modes of investment. It is impossible that he should always have his assets in such a state as to be applicable immediately to the payment of all demands which may be made upon him; and if a partner has no power, under such circumstances, to borrow money for the partnership, either the assent of each individual member must be obtained, which may even be impracticable, or the concern must be ruined.

" 'We have no doubt at all, therefore, that, in ordinary banking partnerships, such power exists, and that the directors, by the terms of their appointment, had all the general powers, and among the rest, the power of borrowing, unless such power is excluded by other provisions of the deed.'

"The next case is that of Curtis *v.* Leavitt, 15 N. Y., 9, decided in 1857. The case grew out of the failure of the North American Trust and Banking Company, incorporated under the general banking law of New York, passed in April, 1838. This bank, having a paid-up capital of over $3,000,000, became embarrassed in 1840, and to provide means to meet its obligations, issued its bonds in two series, one for one million dollars, and the other for half a million dollars; each series of bonds was secured by a separate deed of trust conveying specific assets of the company for that purpose. In 1841 the company went into the hands of a receiver, who instituted this suit to declare these bonds and the trust deeds securing them void as being beyond the corporate power of the company, and also as creating a fraudulent preference. The case was argued by some of the ablest counsel who ever practiced in New York, and from the opinions it is evident that it must have been most carefully argued and thoroughly considered. There were five of these opinions, delivered by Judges Comstock, Brown, Shankland, Paige, and Selden. Each of them discusses the nature of the banking business and the powers given by the New York banking act of 1838. As those powers were given in language almost identical with that contained in the National Banking Act (the sections are quoted, pages 46, 47, *infra*), the decision is of peculiar importance, for it gave a judicial construction to the statute upon which the National Banking Act was modeled. I shall quote from the language of each of the opinions.

"Comstock, J. (p. 51): 'I come next to the objection that banking associations formed under the general law of 1838, have no power to borrow money, and hence that this corporation could not issue its bonds, create the trusts, or give any valid assurance for a loan. This is a very grave proposition, opposed to the known practice of probably every banking institution in the State. It should, therefore, be well considered before it is received as the law. * * *

" 'Banking is not in its nature a corporate franchise. In the absence of legislative restraints, it may be carried on by

individuals and partnerships in all its departments of issuing, lending, receiving deposits, discounting, dealing in exchange, bullion, etc.; and in examining the powers of banking corporations, the nature and incidents of banking as a business, when not under special legal restraints, are in the highest degree important. It is true the question will always be one of corporate power rather than of the rules and principles of banking; but those rules and principles may have a decisive influence in the construction of charters which profess to confer powers of this description. And this leads me to observe that banking, regarded as a business and not as a franchise, includes the borrowing of money as one of its features or incidents. As no one denies this proposition, I will not dwell upon it further than to quote the remarks of an eminent English judge, Mr. Pemberton Leigh, chancellor of the Duchy of Cornwall, in a late case of the Privy Council (The Bank of Australasia *v.* Breillat, 6 Moore P. C., 152, 194).'

"He then quotes part of the same passage which I have just quoted from that opinion, and continues:

" 'It may be quite material, when we come to examine the general banking act of 1838, to observe now, in passing, that in these observations, so just and forceable, the borrowing of money is spoken of, not as a *distinct department* or *branch* in the business of banking, but is asserted as the *incident and result* of two of its most important operations, *those of issuing and receiving deposits.*'

"He then proceeds to show that a banking partnership would undoubtedly have power to borrow money, and that a banking corporation must necessarily have the same power—unless expressly denied, not as a grant of power, but as an incident to the other powers granted, and shows that there are no restraints upon the power so long as it is exercised in the course of the banking business. His discussion of this branch of the subject runs from pages 51 to 66. In this opinion upon this subject Johnson and Bowen, J. J., concurred.

"The opinion of Brown, J. J., commences on page 133; that part of it which relates to the borrowing power begins on page 156. Having stated that the power, if given, is implied and not expressed, he says (p. 158):

" 'Before we can say, with any assurance, whether the power to borrow money is to be implied, we must look at the

act under which the associations are created, and see the nature of the business in which they are to embark, the usual and customary modes in which it is conducted, the instruments and resources with which they are to be furnished, and the emergencies and hazards to which the business is necessarily exposed. Banking is a system of credits. Its circulation is upon credit, it receives deposits upon credit, and if it deals in exchange, either domestic or foreign, that, too, is upon credit, more or less. It discounts bills and notes upon the faith and credit that its circulation will not be suddenly returned for redemption, or its deposits suddenly withdrawn. It is thus that it multiplies its capital and realizes its profits. Take away its power to use its credit. and confine it to the use of its capital alone. and its business would perish. * * * With its liabilities constantly due and open to demand, and its resources unavailable for the moment, it is easy to see that, without the power to obtain temporary relief in an emergency, institutions perfectly solvent would be driven to the wall. * * * If there is any difference in point of expediency and safety between a sale of securities or a temporary loan, it is greatly in favor of the latter, for reasons which I need not name. I am unable to see why borrowing, under such circumstances, is to be deemed an act *ultra vires*. It does no more than create a debt. * * * Banks should be lenders, and not borrowers of money; and it cannot be denied that a habitual and frequent resort to loans leads to disaster. This, however, is an abuse of the power, and no argument against its existence; nor is it any reason why it may not be judicially and beneficially exercised. * * * So long as power is given to employ credit, as the basis of discount and circulation, the power to borrow must be implied, or the business cannot be usefully or successfully conducted.'

"The opinion of Shankland, J., begins upon page 164, and that part of it relating to this question will be found on pages 164, 171. Having shown that in the idea of a bank deposit there is nothing but a loan by the depositor to the bank, he continues (p. 166):

" 'In this last and widest acception of the term *deposit*, it was most probably used by the legislature of 1838; for it was well known in all commercial communities, at that period, and to all competent legislators, that borrowing money to lend again is a part of the legitimate business of banking. A

banker is a dealer in capital, an intermediate party between the borrower and lender. He borrows of one party and lends to another, and the difference between the terms at which he borrows and lends is the source and measure of his profits. (Gilbert's Pr. Obs. on Banking, 25; 1 McCulloch's Com. Dic., 86, 117.)

" 'I am unable to perceive any reasons of policy to deny to the banks the privilege of incurring obligation by way of loan while they can incur the like obligation by taking in deposits. In truth, the obligations we have seen are the same, except in name.'

"Page 169: 'Although the power to borrow money may be justly predicated on the express power to receive deposits on the principles of construction above indicated, or may be found amongst the mass of unenumerated, incidental, and necessary ones, I prefer to put my opinion upon the broad ground that every corporation, unless prohibited by law, can incur obligations, as a borrower of money, to carry on the legitimate business for which it was incorporated, although not specially authorized to borrow by its charter. Such has been the uniform language of the courts in this country.'

"The opinion of Paige, J., begins upon page 182; that part of it relating to the borrowing power will be found on pages 209, 222. On page 210, he says:

" 'The power of the North American Trust and Banking Company to borrow money may be maintained as an incidental power necessary to carry on the business of banking. This power has always been claimed and exercised by banks of discount in all commercial countries. In the original charter, granted in 1694 to the Bank of England (Act of 5 and 6 William and Mary, ch. 20), the power of that bank to borrow, as an incidental power, was conceded by imposing a restriction in respect to the amount to be borrowed. The same concession was made by the enactment of the several acts of the British Parliament, restraining in favor of the Bank of England, all corporations, etc., from borrowing money on their notes, payable at a less time than six months. The Scotch banks exercise this power. It is one of the principal sources of their profits, to borrow at a low rate of interest, and lend at a higher. (3 Edin. Ency., tit. Bank, 220, 224; Cyclopaedia of Arts, etc., tit. Bank; 1 Chitty on Bills, 15, 16.) Beawes, in his *Lex*

Mercatoria, 384, says: "That the legitimate business of a bank of discount, deposit, and circulation, consists in borrowing money upon their own credit; lending money on good securities; buying and selling bullion; discounting bills of exchange or other secure debts; and receiving and paying the money of other persons." And at page 398, he says: "The Bank of England may borrow money on any contracts, and may give such security as shall be satisfactory to the lender." This power was always exercised by the old incorporated banks of this State, and it has also been exercised by the banking associations since the passage of the act authorizing their formation. It has been exercised by these banks as a legitimate power of banking, and as the necessary and usual means to en-enable the banks to carry on the business of banking:

"Page 214: '*The exercise of the power to borrow money is usual in the course of the ordinary business of a bank*; *and it is directly and immediately appropriate to the execution of the expressly granted powers.*'

" 'This power to borrow money for the legitimate purposes of the company may also be maintained as a power conferred upon it by the express terms of the general banking law, as an incidental power necessary to carry on its business of banking. It may be supported as an incident to some, if not to all, of the specific powers expressly granted, viz: the power to discount notes, etc., to receive deposits, to buy and sell gold and silver bullion, and bills of exchange, to loan money, to purchase public stocks to deposit with the comptroller, and such real estate as it was authorized to purchase. The old chartered banks exercised the power to borrow, to enable them to discount notes. I can see that a prudent exercise of this power by a bank, in anticipation of receipts from the payment of its outstanding paper, for the purpose of accommodating its customers, may be an appropriate means to enable it to exercise the power of discounting notes. So borrowing money to provide funds to be placed temporarily in the hands of a foreign correspondent, in anticipation of those to be supplied in the regular course of business, may be so useful and appropriate as to be regarded as an incidental power necessary to the sale of bills of exchange. * * * The express grant of a general power to buy gold and silver bullion, etc., bills of exchange, public stocks and real estate, implies the power to purchase these things on credit; and the power to contract debts is a necessary result of the power to buy on credit. The debts

of a banking association, thus legally contracted in the course of its legitimate business, may become due at a time when; in consequence of unexpected losses or an unforeseen drain on its cash resources, the company, although perfectly solvent, may be unable to pay them. In such an emergency has not a banking association the power to extricate itself, and thus to avert its ruin by means of a temporary loan of money? It is very apparent to me that these associations, when placed in such circumstances, and even under any circumstances, have the power to borrow money for the purpose of paying their lawful debts.'

"While Judge Selden differed with his colleagues as to the authority of the North American Trust and Banking Company to issue the securities in question, this was not upon the ground that borrowing money did not fall within the scope of the banking business, but that the power to borrow given to this bank was limited so that it could be used only in aid of the branches of the banking business specifically named in the statute; and the securities in question were not issued under the exercise of any such power. He expressly concedes that borrowing is an ordinary incident of the banking business, his language upon that subject being as follows (pp. 255, 256):

" 'The receiver's counsel takes the broad ground, that banking corporations cannot borrow money, or, at least, that they cannot borrow to supply the place of capital. They contend that it is the business of banks to lend money, not to borrow; that borrowing does not come within the scope of legitimate banking, and is in its nature a power which corporations created for banking purposes cannot properly exercise. This position is not supported by any direct authority; and a careful consideration of the nature of banking, together with an examination of its history, has satisfied me that it cannot be sustained. It is not in harmony with the present practice or the past history of banks. Banking for profit is based primarily upon the idea of borrowing, without interest, the various sums which the individuals of a commercial community must necessarily keep on hand unemployed, to meet any sudden emergency, and reloaning the money or the greater part of it upon interest. It may be said that banks may borrow, that is, receive deposits without interest, but cannot borrow upon interest. This, too, is untenable. One of the soundest banking systems known to the age, viz: the Scotch, is sustained to a great extent by sums borrowed at a rate of interest below

that charged by the banks. (Edin. Ency., 224, tit. Banks; Lawson's Hist. of Banking, 419.) The committee appointed by the House of Lords in England, in 1826, to inquire into the Irish and Scotch systems of banking, reported that it was "proved by evidence and by the documents, that the banks of Scotland, whether chartered joint stock companies or private establishments, have, for more than a century, exhibited a stability which the committee believe unexampled in the history of banking." (Lawson's Hist. of Banking, 434.) The country bankers of England also allow interest on the balances of money in their hands. (McCulloch's Notes to Smith's Wealth of Nations, 489, title Money, Edin. Ed.; Lawson's Hist. of Banking, 273.) Another writer, speaking of the practice of borrowing by the Scotch banks, says: "This is in fact a part of the proper business of a bank. A banker is a dealer in capital, an intermediate party between the borrower and the lender; he borrows of one party, and lends to another, and the difference between the terms at which he borrows and those at which he lends is the source of his profit." (Gilbert on Banking, 52.) It can scarcely be said, in view of these precedents and authorities, that borrowing money, even to be used as capital, is not within the range of the business of banking. The position, therefore, that the acts of the banking company in issuing the paper in question, were *ultra vires*, cannot be sustained on the ground that borrowing is a part of legitimate banking, but must rest on that branch of the argument which is drawn from the terms of the general banking law itself. It is a question, not of appropriate banking, but of corporate power.'

"He then proceeds (pp. 256, 271) to discuss the question whether this corporation was given the power of borrowing money broadly in its general business, and reaches the conclusion that it was not; that such power was given for certain limited purposes only, within which the action taken in the case in hand did not fall; and hence concludes that the securities given were *ultra vires* and void. But he further declared (p. 283) that, in so far as the money advanced upon those securities was applied to the use of the bank, the holders of the securities were entitled to be ranked as creditors for money had and received.

"The conclusions of the whole court are set forth in fourteen propositions, stated on pages 294, 297. Of these, the

fifth, Judge Selden dissenting, declares that the North American Trust and Banking Company had power to borrow money and to issue time paper to secure a debt for moneys loaned.

"The last of the three cases mentioned above is Ward *v.* Johnson, 95 Ill., 215, decided in May, 1880. There a corporation called the Farmers, Merchants, and Mechanics Savings Bank had all the powers ordinarily given to a commercial bank, and, in truth, was such, as stated by the court on page 243, though styled a savings bank. This corporation established what it called an investment department, whereby certificates were issued for sums of $100 and upwards, bearing interest at 7.3 per cent per annum, secured by a deed of trust whereunder certain specific property of the corporation was put into the hands of trustees. The corporation also did a general banking business. The bank having failed and been put into the hands of a receiver, it was contended, as in the case of Curtis *v.* Leavitt, 15 N. Y., 9, that these certificates were invalid because given for borrowed money. On pages 237, 239, the court, speaking through Mr. Justice Scholfield, after reciting the powers of the bank, say:

" 'In addition to these express powers, there can be no doubt that such corporations possess, also, the implied power to borrow money. * * *

" 'The corporation was authorized to contract and agree with persons desiring to make deposits or loan money as to the terms. * * * The business is simply that of a bank obtaining money, and, so far as the public was concerned, presumably needed in its business, and securing it by a trust deed upon terms mutually satisfactory to the respective parties in interest. The name is not of the slightest consequence. The transaction itself, individually considered, is neither unusual nor extraordinary.'

"As stated above, other cases illustrating the judicial recognition which has been made of the power of banks to borrow money, will be mentioned later in discussing other propositions. To these I refer now, without stopping to quote from them. Indeed, after a thorough search, I can say that I have found but one case or reference thereto, aside from the decision in the case of the Western National Bank *v.* Armstrong, wherein it was intimated that borrowing money was not an ordinary incident of the banking business. That single instance is the

decision of Judge Blodgett, of the Northern District of Illinois, in the case of Adams *v.* Cook County National Bank. His opinion seems never to have been printed; at least, I have been unable to find it, and it has escaped the vigilance of the editor of the new series of Federal reports, known as 'Federal Cases.' Wherever it is mentioned, reference is given to Ball on National Banks, page 54, as the primary publication. The opinion is there stated to be in manuscript, and nothing is given to show the nature of the case, what questions were before the court, or whether its language upon this subject was decision or *obiter*. All that is said is the following:

" 'The power of a national bank to borrow money or to give notes is neither expressly nor impliedly given by the act. The business of the bank is to lend, not to borrow money; to discount others' notes, not to get its own notes discounted. A bank, under certain circumstances, might become a temporary borrower of money on time; yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the agent acting for the bank had special authority to borrow money. The burden of proof in such cases would be upon the lender.'[1]

"I submit that I have said enough to show conclusively that it is the reverse of truth to say that the borrowing of money is outside of the course of ordinary and legitimate banking. It may be unwise banking to pursue this course under ordinary circumstances; but, wise or not, it is certainly legitimate. Its wisdom depends upon the success with which it is done.

"III.

"NATIONAL BANKS HAVE POWER TO BORROW MONEY.

"The National Banking Act, Revised Statutes, sec. 5133, provides that 'Associations for carrying on the business of banking under this title may be formed by any number of natural persons, not less in any case than five.' The section then describes how the articles of association shall be prepared; section 5134 says what those articles shall contain, and section

(1) See Central Trust Company *v.* Cook Co. Nat. Bank, 15 Fed., 885, where Judge Blodgett held the bank liable on an indorsement of notes by the president without authority.—F.

5135 states how they shall be authenticated. Section 5136 gives the powers conferred upon such associations, from which I quote the third and seventh clauses:

" 'Third.—To make contracts.'

" 'Seventh.—To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by lending money on personal security; and by obtaining, issuing, and circulating notes, according to the provisions of this title.'

"For comparison I quote also the equivalent parts of the eighteenth section of the New York General Banking Act of 1838, session laws of that year, chapter 260, page 249:

" 'Section 18. Such association shall have power to carry on the business of banking, by discounting bills, notes, and other evidences of debt; by receiving deposits, by buying and selling gold and silver bullion, foreign coins, and bills of exchange, in the manner specified in their articles of the association for the purposes authorized by this act; by loaning money on real and personal security; and by exercising such incidental powers as shall be necessary to carry on such business.'

"It will be observed that the Federal statute is modeled largely upon that of New-York, but changes the order by putting the clause as to incidental powers before, instead of after, the powers specifically named. The reason for this transposition is probably to be found in the opinion of Judge Selden, in the case of Curtis *v.* Leavitt, 15 N. Y., 9, which has just been referred to. As I have already stated, while he was of opinion that borrowing money was incidental to the banking business as ordinarily conducted, yet he was also of opinion that this power was not given to corporations organized under the New York act, and the reason for this he gives on page 266, saying, in substance, that the extent to which the banks may exercise incidental powers depends upon what is meant by the phrase 'such business' after the grant of those powers; and that if the words 'such business' as there used could be referred to the general business of banking, and not to that business as limited

by the specifications contained in the section, then he would be prepared to admit that all powers incident ordinarily to the business of banking were granted. In other words, he was of opinion that such business should be restricted to the business immediately before described, and not to the business of banking more remotely referred to. His colleagues did not agree with him in this construction, as has been already stated, and held that all powers incident to the business of banking were granted. The transposition in the Federal statute by which the business of banking is immediately, instead of more remotely, connected with the grant of incidental powers, was evidently made *ex industria*, to avoid the possibility of the argument made by Judge Selden being used in the Federal courts; for the draughtsman was Mr. Spaulding, of New York (Briggs *v.* Spaulding, 141 U. S., 132, 156), who was undoubtedly familiar with the discussion the phraseology of the New York act had caused. And so in the First National Bank *v.* National Exchange Bank, 92 U. S., 122, 127, this section was construed; and it was there held in effect that national banks, in transacting a banking business, might do everything which a natural person could do under like circumstances, except in so far as the statute expressly limited their power.

"In the Western National Bank *v.* Armstrong, 152 U. S., 346, no intent is expressed to limit the doctrine of the case just mentioned. The power of a national bank to borrow money is conceded; the statement of the court was that the exercise of this power was an extraordinary, and not an ordinary incident in the banking business. This latter proposition I have already discussed and shown, I trust, to be based upon a mistake of fact, and therefore not conclusive upon this court.

"IV.

"DIRECTORS OF A NATIONAL BANK MAY DELEGATE THE BORROWING POWER.

"This proposition also needs but little discussion. The statute contains no restrictions upon the powers of the directors in this behalf. No general rule of law, of which I am aware, can be cited which should be read into the statute as an implied limitation. The opinion in the case of the Western National Bank *v.* Armstrong, 152 U. S., 346, ex-

pressly admits the right to make a special delegation, and does not controvert the right to make a general delegation to do this particular act. The act of borrowing is one which cannot well be performed by the directors as a body; from the necessity of the case, they must delegate its execution to one or more persons; and they may, with this, delegate discretion in the manner of exercising it. Instances are furnished by the cases of Fleckner *v.* Bank of United States, 8 Wheaton, 338, and Ridgway *v.* Farmers Bank of Bucks County, 12 S. & R., 256. Others have been given in the cases already referred to in discussing the nature of borrowing power. And still others will be found among the cases referred to under the next proposition."

The argument of Judge Worthington seems to us a conclusive refutation of the proposition that even borrowing in the common acceptation of that term is outside of the ordinary and legitimate course of banking business, especially as applied to the business of all banks at all localities and all seasons. At all events it sheds much light upon the questions discussed in this case, and we are indebted to Judge Worthington, not only for this, but for other valuable information and suggestions, which we shall use here in argument.

II.

The transaction in this case (rediscount) was not out of the course of ordinary and legitimate banking business. It was within the express powers granted by the statute. Nor is it a borrowing of money within the meaning of the statute, nor of the Western National Bank case.

However similar the result of a rediscount of negotiable paper may be to that of a loan to a bank, there is a marked dis-

tinction between the method of accomplishing such results, the custom and usage of the banks and the essential merits thereof. In offering its own note for the purpose of securing money the bank only offers its own promise. The value of that promise is measured by the ability of the bank to pay. It may overreach the capital stock of the bank, or it may anticipate that which has not been paid in. The bank becomes *primarily* liable.

On the other hand the negotiable securities of a bank may, and usually do, form the principal part of the assets of the bank. These may consist of bonds, notes, or even stocks, as well as gold coin. As is well known to every one who has any knowledge of the business of banking, it is not an unusual thing that at times an accumulation of such funds becomes so great as to absorb more of the bank's cash than it can spare and meet the demands of its customers, and it becomes necessary to dispose of some of its securities in order to obtain the necessary supply of money. It may dispose of government or other bonds, or stocks, and no one would think it an unusual transaction. Why may it not dispose of a promissory note for the same purpose? Banks buy and sell exchange, and the indorsement of the bank carries with it the same liability as the indorsement of a note. This liability is only secondary or conditional, whereas the liability for borrowed money is primary. It is the business of banks to supply their customers with money as much as it is the business of merchants to keep on hand goods with which to supply the demands of trade. It is a common thing for money to be in greater demand during certain seasons of the year in

some parts of the country than in others, and this is especially true in the South and West. The small country bank has to call upon the larger banks in the cities, and these banks in turn call on the still larger banking institutions in the East, and likewise these banks extend their business to Europe. This is principally carried on, as a rule, through the method of rediscounts; and, as is shown in this case, the bank making the rediscount usually does so at a less rate than it exacts from its customer, by which it derives a legitimate profit. These are well known incidents of banking of which the courts will take notice.

The right of banks to rediscount and dispose of negotiable paper has been recognized and uniformly adhered to by the courts from an early period.

In Planters Bank *v.* Sharp *et al.*, 6 How., 322, 323, this court discusses and recognizes it. And so self-evident and unquestioned is the power that the court in Marvine *v.* Hymers, 12 N. Y., 223, expresses surprise that the court in the Planters Bank case should have stopped to discuss it.

4 Thompson on Corp., sec. 5754.

In Wild *v.* Bank of Passamaquoddy, 3 Mason, 506, Judge Story said: "The cashier of a bank is, *virtute officii*, generally intrusted with the notes, securities and other funds of the bank, and is held out to the world by the bank as its general agent in the negotiation, management and disposal of them. *Prima facie*, therefore, he must be deemed to have authority to transfer and indorse negotiable securities held by the bank for its use and in its behalf. No special authority for this purpose is necessary to be prov[illegible]"

4 Thompson on Corp., sec. 4789, and authorities cited.

Sturgis & Co. *v.* The Bank of Circleville, 11 Ohio St., 153.

In Bank of Genessee *v.* The Patchin Bank, 13 N. Y., 309, the indorsement was for accommodation; it was held that while a banking corporation may become the indorser of and procure paper owned by it to be discounted for the use and benefit of such banking association, it is not authorized to make an accommodation indorsement; but if it be proved that the party discounting paper indorsed for accommodation advances money upon it to and at the request of the bank in good faith, relying upon its representations that the paper belonged to and was indorsed and discounted for its use and benefit, the banking corporation would have been liable upon the contract of indorsement, and that the cashier of the bank securing the rediscount, making the representations, acts for the bank.

Denoi, J., said: "I entertain no doubt but that a bank may lawfully indorse the commercial paper which it holds, with a view to raise money upon it by way of discount, or for any other lawful purpose. In this respect it has the same right as any other holder of such paper. (Marvine *v.* Hymers, 2 Kern., 325.)

"The power of a bank to avail itself of its assets in this way (rediscount) is as perfect as that of any merchant. The authority to do so is important, if not quite essential to the existence of these institutions. The contract of indorsement is incident to the negotiation of mercantile paper, and the right to transfer such paper includes the power to enter into the collateral contract which an indorser assumes. * * * The

indorsement of the bank was therefore void in the hands of every person having notice of the facts; but if the proper officers of the defendant have negotiated to the plaintiff, representing it to be a bill belonging to their bank, and upon the faith of that representation the plaintiff has in the usual course of business discounted it, advancing to the defendant the proceeds, the defendant is precluded, upon the principle referred to, from setting up that it was indorsed without authority (page 316).

"It was transmitted to the plaintiff in an official letter written by that officer (the cashier), with the request that the plaintiff would discount it. It is not said in terms in the letter that the discount was applied for for the benefit of the defendant, but this is as strongly implied as though it had been stated, as no other party is alluded to and there was nothing in the tenor of the bill or in the terms of the letter to suggest the idea that the former was accommodation paper, or that any other party than the defendant had an interest in the transaction which the letter invited.

"Upon the facts of the transaction, it presents the case of one bank sending one of its discounted bills to another bank to be rediscounted for its use, and there is no evidence that the plaintiff's officers knew or suspected that this was not actually the case. It was, therefore, a correct instruction to be given to the jury that the plaintiff was entitled to recover, though they should find that the bill was drawn and was indorsed by the defendant for the benefit of the railroad company and in order to raise money for its accommodation, provided it appeared that the plaintiff discounted it in good faith in consequence of a representation by defendant that it was its bill."

Houghton *v.* First Nat. Bank, 26 Wis., 663; S. C., 7 Am. Rep., 107.

In Bank of Genessee *v.* Patchin Bank, 19 N. Y., 314, 315, the court said: "That the defendant had the right to procure its paper to be rediscounted for the use of the bank is well settled, and is not now questioned by the defendant's counsel."

Pratt *v.* The Topeka Bank, 12 Kan., 571.

In West St. Louis Savings Bank *v.* Parmelee *et al.*, 95 U. S., 557, the court said: "Ordinarily, the cashier, being the ostensible executive officer of a bank, is presumed to have in the absence of positive restrictions, all the power necessary for such an officer in the transaction of the legitimate business of banking. Thus he is generally understood to have authority to indorse the commercial paper of his bank and bind the bank by the indorsement. So, too, in the absence of restrictions, if he has procured a *bona fide* rediscount of the paper of the bank, his acts will be binding, because of his implied power to transact such business."

In The Bank of the State *v.* Wheeler, 21 Ind., 90, the cashier, without authority of the directors, and against their wishes, discounted a note for the accommodation of a customer and then rediscounted it by indorsement with another bank, and to conceal the transaction made false entries upon the books of the bank. The bank when sued on the indorsement defended on the ground that the indorsement was made by the cashier, as was or might have been known by the plaintiff, for the accommodation of other parties, without authority from the bank, but the bank was held liable.

The court said: "It follows that the bank was liable upon the indoresement made by the cashier, and the judgment for the plaintiff was right if the purchase by Wheeler was *bona fide.* It would certainly greatly embarrass monetary and mercantile transactions, if every man who bought and sold gold and silver and commercial paper at the counter of the bank, of or to the cashier, was compelled to call for the records of the bank to see that the cashier had the powers he assumed,

being within the general scope of the authority of such officer. The directors of the bank are not usually in perpetual session, while the business of banks is occurring every day, and must, of necessity, be transacted by officers in charge, or not at all. The public interest requires that the banks should be bound by the acts of their officers in their ordinary business. * * * The case, in one view of the evidence, is this: A person comes to town to sell, or to get discounted, a note. There are two banks in town; one has plenty of money to spare with which to buy the note, but refuses to do so because it is not certain as to the goodness of the paper; the other is hardly able to spare the money for the purchase of the note, but is satisfied of the goodness of the paper and is desirous to purchase it, and is willing to do it if it can ascertain where it can sell the paper, and raise the money, if finding itself in need. It learns that bank No. 1, in the town, will buy the paper if it is offered to it by bank No. 2, with its indorsement on the paper. Bank No. 2 accordingly buys the paper, and afterwards sells it to bank No. 1. We see nothing in this but a legitimate transaction."

Jones *v.* Hawkins, 17 Ind., 550.

In Cooper *v.* Curtis, 30 Me., 490, the court said: "It is part of the ordinary business of banking corporations to negotiate bills of exchange and promissory notes. Under the authority to sell and convey the property of the bank, it could transfer negotiable paper in the mode usually practiced. The indorsement made by the cashier, acting in his official capacity for the bank, is sufficient evidence that he acted by its authority."

Farrar *v.* Gilman, etc., 19 Me., 440.

In Davenport *v.* Stone (Mich.), 62 N. W., 722, the cashier of a bank took a note from a customer, which was never entered on the books of the bank. He rediscounted the note with another bank, indorsing the same with his bank's guaranty. The financial management of the bank had been intrusted by the board of directors to him. On suit on the bank's indorsement the defense was set up that it was unusual for banks to rediscount paper and that the cashier had no such authority. The court, after reviewing the cases of Bank *v.* Armstrong, 152 U. S., 346, and Lamb *v.* Cecil, 25 W. Va., 288, and 28 W. Va., 653, the only cases presented in support of the defense, and showing that they had no application to the case, said: "The question, however, is reduced to the power of the board of directors; for as already shown, if the board had the power, and the cashier exercised it under the above facts, his act binds them. We are not concerned to determine whether such a power is wise or unwise. Much can be said against it. It would, however, be a surprise to the banking interests of the State to find that no such power existed. It has been exercised for many years, and in the course of the business the transferring bank makes itself liable by indorsement. The rediscounting bank must, of course, rely upon the liability of the transferring bank, with whose responsibility it is familiar. The extent of this business will be seen from an examination of the reports of the commissioner on banking, under the heading, 'Notes and Bills Rediscounted.' An examination of the report of 1893, discloses that there were sixty-eight State banks and forty-five national

banks in this State carrying rediscounted paper. The amount of such paper, December 19 of that year, was nearly $1,100,-000. There must, therefore, have been a consensus of opinion among the attorneys for these banks, that such power existed. We need not discuss the subject further. The authorities fully sustain this power. People's Bank *v.* National Bank, 101 U. S., 181. Bank *v.* Wheeler, 21 Ind., 90. See also, Bank *v.* Perkins, 29 N. Y., 554. Cooper *v.* Curtis, 30 Me., 490. Plaintiffs rediscounted this paper in the usual course of business, and without any notice or reason to believe that the cashier had not full authority." The doctrine of this case is again affirmed by the same court in First National Bank of Kalamazoo *v.* Stone, 64 N. W., 487.

The statute (Rev. Stat., sec. 5156, clause 7) defines the powers of national banks as follows:

"To exercise, by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting and *negotiating* promissory notes, drafts, bills of exchange and other evidences of debt."

Here the power to negotiate is given in express terms, the same as the power to *discount*. The statute applies with as much force to "negotiating promissory notes" as it does to negotiating "drafts, bills of exchange and other evidences of indebtedness."

In People's Bank *v.* National Bank, 101 U. S., 181, where the vice president of the defendant bank had, by guaranty of payment, without authority from its board of directors, induced the plaintiff bank to discount certain negotiable notes made by a debtor of the defendant bank to his own order and

indorsed in blank, the proceeds being turned over to the defendant bank, this court, speaking by Mr. Justice Swayne, after quoting from Revised Statutes, section 5136, as above, say (page 183):

> "To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named. Undoubtedly a bank might indorse, 'waiving demand and notice,' and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by such an indorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant to give the guaranty here in question. It is to be presumed the vice president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it."

In Thomas *v.* City National Bank (Neb.), 58 N. W. Rep., 943, the facts were almost the same as in the case at bar, and the same defense was interposed, but the court, following and approving the case of the People's Bank *v.* Manufacturers National Bank, 101 U. S., 181, held, that it was within the powers of the bank to negotiate the paper, and that the authority of the president to bind the bank would be conclusively presumed in favor of the purchaser acting without notice to the contrary.

The power is still further emphasized by the statute (sec. 5200) in that after it prohibits the banks from allowing any one person, firm, etc., to borrow more than one-tenth of the capital stock of the bank, it expressly provides that "the discount of commercial or business paper * * * shall not be considered as money borrowed."

If the position of counsel that rediscounting is borrowing be sound, this provision of the statute is without meaning, and the New York Bank has been guilty of a violation of the law,

because it is shown that the amount of rediscounts at the time the paper in controversy was taken was greatly in excess of 10 per cent of the capital stock of the New York Bank. If, however, there was no violation of the statute, then the position of counsel cannot be correct.

In the Western National Bank case the court indicated a doubt as to whether or not banks have power to borrow, and, after quoting the statute (secs. 5136, subdivision 7), which expressly grants the power to discount and negotiate promissory notes, says: "The power to borrow money or to give notes is not expressly given by the act." Now, we presume, no one will contend that the court intended to hold, notwithstanding the express language of the statute just quoted by it, that it does not confer the power to negotiate promissory notes as well as to discount them, the same as in cases of drafts, bills of exchange, etc., and yet, if borrowing and rediscounting be the same thing, this is just what the court did say. Of course, this court could not have intended any such folly. It could not have been unmindful of the express language of the statute. Nor can we presume that it could have been unmindful of the self-evident proposition that the very power to discount negotiable notes implies the power to negotiate the same, else why make the notes negotiable. This proposition was clearly elucidated by the court in Planters Bank *v.* Sharp *et al.*, 6 How., 322. Nor was it attempted to be shown in the Western National Bank case that the transaction between the two banks was in harmony with a previous course of business, which had grown up and existed between them, nor that the vice president had been in the habit of attending

to such things, nor that it was a customary transaction with the banks in that locality, or in that State, as was shown in this case.

In this connection we call attention to the reports of the Comptroller of the Currency, which we offered in evidence, made in 1893, pages 273 and 299 (Tr., pp. 51-52), as well as those to which Judge Worthington has referred (page 21 of this brief), and which show that rediscounting formed a very large item in the transactions reported to the comptroller, and could not have been an unusual occurrence. Besides the fact that it was a common thing for banks in the State of Arkansas, and generally throughout the United States, to rediscount, as shown by the reports of the Comptroller of the Currency, the fact that it was the custom, not only of the First National Bank, but of all the banks in Little Rock, to rediscount, was not questioned (Tr., pp. 46-51). It is not questioned that at least one other bank left the matter of rediscounts entirely with the president and cashier. It is not questioned that the board of directors of the First National Bank exercised no supervisory control over the matter of rediscounts whatever, and that was left entirely with the president and cashier. It is not questioned that Allis was the principal officer in charge of the bank and had the general management of its affairs; that the matter of rediscounts was, as a rule, referred to him and he directed when and where the same should be made (Tr., pp. 48, 49, 53, 60). It is not questioned that the bank frequently made rediscounts to a large amount, and that this fact was known to the board of directors. The board of directors in so far as rediscounts were concerned had effectually vested

that power in the president and cashier if not in the president alone. Under these circumstances no special authority was required in order to enable the president and cashier to make rediscounts. They were simply exercising the authority previously vested in them by the board. If necessary, special authority will be presumed. In this respect they possessed all the powers of the board. It was proven (Tr., pp. 12, 13) that the correspondence and transactions were such as are usual for the president and the cashier of a national bank to carry on and exercise, this testimony is uncontradicted.

What may be an unusual or extraordinary transaction in one place may be quite common or ordinary in another. In some States the receipt of special deposits is considered outside of the regular course of banking business, and not within the authority of the cashier, while in others it is a common practice among all the banks and the power of the cashier is not questioned.

1 Morawetz on Corp., sec. 540 (2d Ed.).
Wiley *v.* First Nat. Bank, 47 Vt., 546.
Whitney *v.* First Nat. Bank, 50 Vt., 388.
Patterson *v.* Syracuse Nat. Bank, 80 N. Y., 82, 94.
National Bank *v.* Graham, 100 U. S., 699.
Banner *v.* Bank of Columbia, 9 Wheat., 583.

This is true in reference to the custom of any particular bank, without regard to locality. If a bank becomes accustomed to doing a certain line of business, or adopts or acquiesces in certain methods of business carried on by its officers, it will be held liable therefor, as if special authority had been granted.

1 Morse on Banking, sec. 9.

Bank *v.* Graham, *supra.*

Wing *v.* Bank (Mich.), 61 N. W., 1009.

Davenport *v.* Stone (Mich.), 62 N. W., 722.

Bell *v.* Hanover Nat. Bank, 57 Fed. Rep., 821.

Cox *v.* Robinson, 70 Fed. Rep., 760; affirmed, 82 Fed. Rep., 283.

Simmons *v.* Fisher, 55 Fed. Rep., 909.

Fisher *v.* Simmons, 64 Fed. Rep., 313, 314.

The cases relied on by counsel to sustain the position that there is no difference between borrowing and rediscounting, principally arise where usury or some violation of the statute was pleaded against the bank taking the paper, and it is simply held that a discount is one method by which the bank puts its money at interest. They do not affect the question as to the power or custom of a bank to negotiate its own paper, nor do they hold that when a bank does so it is borrowing. The distinction is clearly drawn by the court in the case of Bank of Alexandria *v.* Mandeville, 1 Cranch (C. C.), 556, as follows:

"The distinction between an anticipation of funds by discount and a loan of money upon interest exists in the nature of things. Suppose I shipped a cargo of flour to a merchant in Boston, who, in payment remits me a bill of exchange at sixty days sight, upon a merchant at Alexandria, who accepts it. I wish to anticipate this fund. I apply to the bank to discount it. Do I ask for a loan? Do I wish to borrow money? No. I am entitled to the receipt of a sum of money at the end of sixty days, but I wish to anticipate the receipt of it. I wish to receive it now instead of then. The bank discounts this bill. If it were a loan from the bank to me, I should be the principal debtor, and the first person liable to the bank; but in truth, by indorsing the bill to the bank, I became only a collateral or a conditional debtor. The acceptor is the principal debtor to the bank, and to him must they first

apply for payment; if not paid they must protest, and give notice to me of the nonpayment as soon as possible, under all the circumstances, and, if they neglect to demand payment from the acceptor, or to give me due notice of nonpayment, they have no claim upon me. Can this, then be a loan of money from the bank to me? Nothing can be more different. I am only liable as the indorser of a bill. If it were to be considered a loan at all, it should rather be a loan to the acceptor, the principal debtor in the transaction. But it is not a loan to any person; it is a mere accommodation in shortening the time of payment. It was said, in argument, the transaction must either be a loan of money or a purchase of the note, and that it could not be a purchase if the vendor guaranteed the bill by indorsement and that the bank was not authorized to trade in the purchase of bills, consequently it must be considered as a loan. This is clearly a *petitio principii*. It assumes the principal in dispute. *There is a transaction which is neither a loan nor a purchase of the note, and that transaction is discount.* If it be not a loan, it cannot be a forbearance of a sum of money lent; if it be neither a loan or a sum of money lent, it is not a transaction prohibited by the statute of usury.

"A clear case, then, of mercantile discount, being the anticipation of funds, and not a loan of money, is not within that statute. Thus stands the case upon general principles of law and reason."

S. C., 2 Federal Cases, No. 850, p. 607.
Nichols *v.* Feaeson, 7 Pet., 109.

In Planters and Merchants Bank *v.* Goetter, 19 S. O. Rep., 54, it was held that money loaned by a bank at an usurious rate of interest on notes taken, payable at a future day, was not a discount within the meaning of the statute of Alabama.

The statute confers the same power on national banks to discount and negotiate promissory notes that it does to receive deposits. To receive deposits is one method of borrowing—is more like borrowing than is rediscounting—yet it is distin-

guishable from borrowing, as held in State of Nebraska *v.* First Nat. Bank of New Orleans, 88 Fed. Rep., 947.

The opinion of the court of appeals in this case (79 Fed. Rep., 296) is well considered, and clearly draws the distinction between borrowing and rediscounting, and between this case and the Western National Bank case. That case is still further distinguished and limited in its ~~the~~ application by the very carefully considered and able opinions in the cases of Chemical Nat. Bank *v.* Armstrong, 76 Fed. Rep., 339, and Armstrong *v.* Chemical Nat. Bank, 83 Fed. Rep., 556, where it is held that the bank was liable for money borrowed under circumstances similar to this case. To these cases we especially call the attention of this court.

Counsel (page 10) quote as follows, from 1 Morse on Banking, sec. 117: "Thus the making of discounts is an inalienable function of the directors," and argues that the board of directors had no power to invest any officer with authority to make rediscounts. But counsel overlooks the fact that this quotation reflects to the powers of the directors in reference to the paper of others offered to the bank for discount. Whether the author is correct to the extent to which the rule is announced we need not here stop to inquire, but whether correct or not it does not refer to the powers pertaining to the rediscount of the paper of the bank when offered to another in order to obtain funds with which to carry on the business of the bank and meet the demands of its customers. Had counsel read a little further he would have seen that the same author in the next section (118) states an entirely different rule as applied to the indorsement of notes.

The power to negotiate notes and make rediscounts must in the very nature of things be vested in some officer, the cashier, president or vice president, or all of them. It cannot in the nature of the case be exercised by the board, as in the case of a party who comes to the bank to offer his note for discount, and where the importance of scrutinizing the security offered may be well looked to. Besides the reasons for not allowing the power to be delegated when it comes to passing upon notes offered for discount do not apply as to the rediscount of paper. In the one case the money of the bank could be easily squandered by an indiscreet cashier or president; whereas, in the other, if he simply rediscounts the paper of the bank, the bank gets the money for it, and there can be no danger of loss if the officer acts honestly, and due caution was exercised by the board in taking the note in the first instance.

In Morse on Banking, sec. 65, pp. 145, 146, it is said:

"But a warranty of goods sold by the bank, or an indorsement of guaranty of a note negotiated by it, is perfectly lawful; for, besides being rendered necessary and proper by the usual habit of business and by the nature of the case, such transactions are not open to the objections above. They are not contracts upon air; the bank receives value and has a real interest; with reasonable care the chance of loss is small, no greater than in many other acts necessary in carrying on its business (no sum of money is put at more than two risks by such transactions), and even if loss occurs it is attributable to the carelessness or misfortune of the bank in acquiring the subject-matter, not in guaranteeing it, and such agreements are not dangerous to the financial health of the community, but beneficial to it."

III.

The parties did not treat the transaction as a borrowing of money.

The effort of counsel for plaintiff in error to show that the transaction in this case is one of borrowing, and so treated by both parties, is not sustained by the facts disclosed in the record.

The proposition contained in the first letter written by the New York Bank to the Little Rock Bank (Tr., p. 16) was as follows: "We will give you 2 per cent on your daily balances, granting you our best collection facilities, taking your foreign items east of the Mississippi River and crediting them to your account immediately without charge.

"If you will send us $50,000 of your good, short time, well-rated bills receivable, we will be pleased to place them to your credit at 4 per cent." To which the Little Rock Bank through Allis, as president, replied, among other things, as follows (Tr., p. 17):

"I inclose herein $50,000 of our best short time, well-rated bills, and also the signatures of our officers. Our average balance with you will be above $10,000, and I trust the connection may be a long and satisfactory one. After the maturity of this paper we shall have nothing to offer you in the way of *rediscounts*, except the paper of country banks, and I hope you can see your way clear to continue this 4 per cent rate during our cotton season."

All the subsequent transactions were of the same nature. The correspondence on both sides use the terms "discount" and "rediscount," and the letter of the Little Rock Bank to the New York Bank relating immediately to the transaction

in question (Tr., pp. 25, 26), says: "It will be necessary for us to make further *rediscounts.*" Counsel ignore all this correspondence, and bases his argument largely on the fact that at a subsequent date an officer of the New York Bank who had not conducted any of the previous correspondence, in answer to a letter from the Little Rock Bank, asking for further discounts, inadvertently used the words "loan" and "borrowing" in connection with a reference to "a panic in Wall Street, for several days; money loaning as high as 40 per cent." No significance can be attached to this. The inadvertence is apparent on the face of the letter, especially when taken in connection with the letter of the Little Rock Bank to which it was an answer, and other letters relating to the transaction, in all of which the term "discount" is used, showing that both the Little Rock Bank and New York Bank understood the transaction not to be a loan (Tr., pp. 28, 29). Besides all the officers of the New York Bank testify that it was an inadvertence (Tr., p. 12).

Nor can any significance be attached to the fact that the New York Bank, in its letter October 11 (Tr., p. 33), suggested to the Little Rock Bank that "you should at least have had funds with us to cover your paper maturing with us." It was one of the terms on which business relations were established between the two banks that a balance should be kept with the New York Bank for which the Little Rock Bank was to be allowed 2 per cent. It is a well known custom among all banks that the bank offering paper for rediscounts for the sake of its own credit and that of its customers, and to facilitate the business of rediscounting, especially that ex-

isting between correspondents as in this case, shall see to it that the bank holding the paper is put to no delay or trouble in collecting the paper. Hence the paper is usually—though not always—sent to the offering bank for collection. It makes the collection on the date of maturity, and takes credit against the holding bank for the amount, while the latter bank, on the same day, charges the offering bank with the amount of the notes, and, if that bank has not enough funds with the holding bank to meet the charge, an overdraft at once appears on the books against it. The rule is well established, that any bank has a right to charge any liability accruing to it from a person with whom it does business, whether by way of check, promissory note, or indorsement against the account of that person, and the New York Bank in this case did nothing more than exercise a legal right.

1 Morse on Banking, secs. 324, 327, 328, 329, 337, 338.

The testimony of the officers of the New York Bank is explicit as to the course of dealing between the two banks; they say: "We had the usual business transactions with the First National Bank of Little Rock, Ark.; they sending us remittances for their credit almost daily, and continually checking on us, as shown by copy of account current herewith, Exhibit 77.

"Q. 4. Were any of the dealings between said banks other than such as take place between banks carrying on a legitimate banking business, in the usual course of business?

"A. No.

"Q. 5. Were the notes in controversy received and rediscounted by the United States National Bank in any way other than in the usual course of business or different from any of the other notes rediscounted by it for the First National Bank of Little Rock, Ark.?

"A. No" (Tr., pp. 12, 13).

This is not contradicted.

Counsel (Tr., p. 18) says: "Exhibit 77 shows that every discounted note was charged to the Arkansas Bank at maturity *without an effort to collect from the makers, and without awaiting returns from Little Rock.*"

In the use of the language italicized by us, counsel is mistaken. There is nothing in Exhibit 77 (Tr., p. 44) which justifies any such assertion.

Again, counsel in order to support his contention in this respect, is forced to put a strained construction upon the testimony of Johnson (Tr., p. 47), and of Davis (Tr., p. 51), when he says in his brief (Tr., p. 19): "The proof in this case, in addition to the above, is that bankers regard rediscounting as borrowing." Johnson clearly shows that while banks obtain money both by borrowing and rediscounting, that rediscounting is in the nature of a sale of the note, instead of the execution of one; that rediscounting is the most common way of obtaining money by banks, and borrowing is rarely resorted to. Davis simply says that since the decision by this court in the Western National Bank *v.* Armstrong, the New York, St. Louis, and Chicago banks require evidence of the authority of the officer to make a rediscount, and counsel as if in desper-

ation, urges that this shows that the bankers have construed the Western National Bank case to apply to rediscounts. If this were true, it would not change the effect of that case as a precedent or as to the real point decided. But because the bankers, after that decision, required a showing of authority as to rediscounts, is no evidence or even an argument that they construed the decision to require it. Considering the cautious habits of bankers, the timidity of capital, and the fact that some of the language contained in the opinion is such as to make the oldest banker uncertain of the safety of any business method theretofore followed, however ancient, the more reasonable inference is that out of an abundance of caution, bankers have adopted the rule to require a showing of specific authority on the part of officers to rediscount as well as to borrow. The argument of counsel along this line brings out strikingly the inconsistency of his contention as to the meaning of the opinion in Western National Bank case, as well as the fallacy of the *dicta* it contains, in that to sustain that case as applied to rediscounting, he finds it necessary to resort to the custom and practice among bankers in reference thereto, while at the same time insisting that that case has undertaken to lay down fixed rules applicable to the conduct of the business of every bank without regard to the previously well established custom and usages of those banks, whether general, local, or those which the banks immediately concerned have adopted and practiced in a well established course of dealing, as in this case.

If we are to rely upon custom and what the bankers think and do, then we have but to turn to the testimony of the wit-

nesses Johnson (Tr., p. 46), Walker (Tr., p. 48), Davis (Tr., pp. 50,51), and the officers of the New York Bank (Tr., pp. 12, 13); the reports of the Comptroller of the Currency (Tr., p. 52, and references thereto by Judge Worthington, *supra*), and as to the custom and usage of this Little Rock Bank in particular—the testimony of Walker, already referred to, its reports to the comptroller (Tr., p. 54), the correspondence between the two banks (Tr., pp. 16-29), as well as the witnesses for the receiver (Tr., pp. 52-64), all of which show that rediscounting is one of the ordinary transactions of banking business common to banks everywhere, and especially as applied to Little Rock banks, and the First National Bank in particular, and that these transactions between the New York Bank and the Little Rock Bank were so common and of such long standing as to justify the most prudent person in granting rediscounts, as was done in this case.

Again counsel shows the utter inconsistency of his position and the fallacy of the Western National Bank case as applied to this when he says (page 19 of his brief): "Other notes which had been regularly discounted by the United States Bank for the Arkansas bank had been paid in the same way, and the United States Bank evidently treated the last transaction exactly as it had done the others." If, as he is forced to admit—as a matter of fact—the other notes *"had been regularly discounted * * * and the United States National Bank* evidently treated the *last transaction exactly as it had done the others*"—all of which is true—how can it be said that this transaction, whether one of borrowing or of rediscount, is "so much out of the course of ordinary and legitimate banking

as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money?" If the previous transactions extending over a period of five months, and involving more than $175,000, were regular, and the last transaction was treated exactly like the others, why should the New York Bank be required to exercise any more diligence in this case than in the others? Why should it not at least be allowed the protection of the well established rule that when a course of business has been adopted and acted upon between two parties through their agents, they have the right to rely upon anything done in accordance with such course of dealing?

Merchants Bank *v.* State Bank, 10 Wall., 604.
Bank of Lyons *v.* Ocean Bank, 60 N. Y., 278.
Armstrong *v.* Chemical Nat. Bank, 83 Fed. Rep., 556.
Chemical Nat. Bank *v.* Armstrong, 76 Fed. Rep., 339.
N. Y. & N. H. R. R. Co. *v.* Schuyler, 34 N. Y., 64

The contention of counsel that "it was unusual for banks in Little Rock or elsewhere in the South to discount at that season of the year" is not sustained by the evidence. It is true Johnson says (Tr., pp. 46, 47) it was usual to rediscount in the latter part of summer, commencing with August, and that "it was not very often that rediscounting was done at other seasons." But counsel overlooks the well-known fact that the chief purpose of rediscounts by banks in the South is to enable them to handle the cotton crop, and that the season for this commences the latter part of summer and extends on

to January or later, and when Johnson speaks of the season he refers to the season for handling cotton. This is evident, as will appear from the first letter to the New York Bank (Tr., p. 17), and from the excuses contained in almost every letter written by the Little Rock Bank, asking for more rediscounts. Besides the reports of the Arkansas banks to the comptroller (Tr., pp. 51, 52) already referred to show that rediscounts amounted to more in December than any other month. And the reports of this Little Rock Bank to the comptroller (Tr., p. 54) show that its rediscounts ran through to May and July.

Again, counsel is not sustained by the record when he contends that the transaction in this case was made upon an unusual length of time. Four of the notes were to run four months and one for five months. By referring to the correspondence (Tr., pp. 17, 22, 23) it will be seen that the notes of both the City Electric Street Railway Company and McCarthy & Joyce Company, as well as others, running four and five months, were rediscounted, and that it was a usual transaction between the two banks.

IV.

Allis, as president, had authority by virtue of his position to make rediscounts for the Little Rock Bank, and to bind it by indorsement in the name of said bank.

Two opposing theories exist as to the implied or inherent powers of the president of a corporation. One ascribes to him *prima facie* the powers of its managing agent for its ordinary

business, and the other denies to him any power whatever to bind it as its contracting agent, unless that power is specially conferred by the board of directors. In Thompson on Corporations, sec. 4617 *et seq.*, the authorities on both sides of the question are collated and the author, at section 4620, with much clearness, analyzes the question as applied to presidents of banks, and sustains the theory of his implied powers. Under this theory it is held (sec. 4621) that the president of a bank may "indorse its negotiable paper for the purpose of transferring title to it in the ordinary course of business." Citing among others, the case of Palmer *v.* Nassau Bank, 78 Ill., 380, where the point was directly ruled in favor of the power of the president. This is also sustained by this court in:

Merchants Nat. Bank *v.* State Nat. Bank, 10 Wall., 604.

People's Bank *v.* Mfg's Nat. Bank, 101 U. S., 181.

See also to same effect:

Thomas *v.* City Nat. Bank, 58 N. W., 943.

American Exchange Nat. Bank *v.* Oregon Pottery Co., 55 Fed. Rep., 265.

4 Thompson on Corporations, secs. 4638, 4639.

Belleville Sav. Bank *v.* Winslow, 35 Fed Rep., 473.

State Bank of Ohio *v.* Fox, 3 Blatchf. (U. S.), 431.

National Bank of Commerce *v.* Atkinson (Kan.), 54 Pac Rep., 8.

Goodrich *v.* Reynolds, 31 Ill., 490; 83 Am. Dec., 240.

Patten *v.* Moses, 49 Me., 255.

2 Morawetz on Corporations, secs. 610, 611.

It will be noted that the National Banking Act, unlike most statutes chartering corporations (see for example S. & H. Dig. of Stat. of Ark., sec. 1330: "The stock, property, affairs and business of every such corporation shall be under the care of, and shall be managed by, not less than three directors," etc. City Electric Street Ry. v. First Nat. Bank, 62 Ark., 33; S. C., 34 S. W. R., 89), does not vest the corporate powers exclusively in the board of directors. The provisions upon the subject are found in the fifth, sixth, and seventh clauses of section 5136 of the Revised Statutes of the United States. These, so far as material to the point under discussion, authorize the corporation as follows:

"5. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers; define their duties.

"6. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

"7. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking."

Thus while the board of directors is given authority to define the duties of the officers of the bank, and also, through by-laws, to declare how the powers of the bank in conducting its business shall be exercised, yet this is not obligatory. If the board does define the duties of any officer, this may act as a limitation upon his powers. If the board passes any by-laws regulating the conduct of business, these also may limit

the powers of the officers. But in the absence of limitation thus imposed, every officer of a bank is empowered, by force of the seventh clause, to exercise all those functions which, by the ordinary usage of business, are vested in officers of the same title or degree. In other words, there need be no express delegation of authority from a board of directors to an officer. His mere appointment clothes him with all the powers, and imposes upon him all the duties ordinarily attached to that office, according to business usage. It needs an express resolution or by-law to shear him of any of those powers or duties.

Briggs *v.* Spaulding, 141 U. S., 132, 144, 146.

Cox *v.* Robinson, 70 Fed. Rep., 762.

There is nothing whatever in the record to show that the authority of Allis had been in the least restricted. Not only is it beyond dispute that he had exercised this authority through a long series of important transactions with the New York Bank, but it is shown by the proof (Tr., pp. 12, 13) that it was usual for the president of a national bank to exercise such authority. The proof is also unquestioned that he exercised these powers without question from the board, as testified by Walker (Tr., p. 48), in that he always directed when, where, and what amount of rediscounts should be made; and, as testified by Kupferle (Tr., pp. 56, 57), acted as general manager and had general control of the bank, directed most or all the business while there, and the cashier as a rule acted under him. And as admitted by all the members of the board who testified, that the board exercised no authority or supervising control over the matter of rediscounts. All these facts were undisputed. And even if the question as an ab-

stract proposition be determined against us, the authority of Allis is clearly established by the evidence.

The effort of counsel to distinguish the case of People's Bank *v.* Manufacturers National Bank, 101 U. S., 181, from this is not sustained by the facts or principle involved. It is not shown with whom the agreement was entered into in that case, on behalf of the bank, whether with the board of directors or the vice president. The inference is that the agreement was made with the vice president, otherwise the board would naturally have at the same time conferred the power on the vice president to transfer the notes. But it is plainly stated that the vice president acted without authority from the board, and the question was as to the *power of the vice president.*

Counsel, commenting on that case, says (page 38): "The vice president carried out the prior agreement made by the bank. As it is stated by the court that the bank itself made the agreement, and that it was carried out according to its terms, of course it would be presumed that the officer who executed it had authority to do so." If this were true, the whole discussion of the case would appear nonsensical; because, if the agreement was made by the bank and carried out in accordance with that agreement, why stop to discuss the power of the officer who executed a valid agreement? Here again, the position of counsel forces him into an inconsistent argument. He contends that Denney, the cashier, was the only officer authorized to indorse the name of the bank. He admits (page 19) that other notes had previously been regularly discounted. He does not dispute that the bank was liable as indorser of the notes of the

Dickinson Hardware Company, which were transmitted by Allis at the same time the notes in controversy were forwarded. The fact that the Little Rock Bank, through its cashier, made the agreement with the New York Bank for the rediscount cannot be denied (Tr., pp. 25, 26). Then we have Allis as president, undertaking to carry out a previous agreement of the bank, with the knowledge of Denney, in which he perpetuates a fraud, and counsel says we had no right to assume that he had any such authority. His argument simply amounts to this, that as the vice president in the People's Bank case carried out the previous agreement, his authority will be presumed, but as Allis in carrying out the agreement in this case perpetuated a fraud no authority can be presumed in him, and the New York Bank must stand the loss. We are unable to see any difference in principle in the two cases. Nor can we see any difference in principle if Denney had sent or indorsed the notes instead of Allis. Counsel ignores the well established principle uniformly adhered to by this court, and especially in the cases of People's Bank *v.* Manufacturers National Bank, *supra*, and Merchants Bank *v.* State Bank, 10 Wall., 604, that "where one of two innocent parties must suffer for the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences," or as said in Merchants Bank *v.* State Bank, *supra*: "Those dealing with a bank in good faith have a right to presume integrity on the part of its officers, when acting within the apparent sphere of their duties, and the bank is bound accordingly."

Again, while counsel argues learnedly that Allis had no power beyond that of presiding over the board of directors,

he does not question the power exercised by Allis to direct an amount equal to the proceeds of the notes in controversy to be placed to his credit on the books of the Little Rock Bank (p. 63). Now as between the power to indorse for the purpose of rediscounting and the power to cause the funds of the bank to be transferred to his own credit, we submit the latter is greater and more dangerous. Objections may very properly be urged against the later exercise of power by any officer as a dealing with the funds of the bank in his own interest, which is prohibited by principles of equity and public policy. But there is no reason why the president—the superior officer—of a bank should exercise less authority in the matter of rediscounts or indorsements of paper than the cashier. Every person who knows anything about the business of banking knows that it is impossible for the cashier always to be on hand for the purpose of making indorsements and signing checks and other documents. He is necessarily absent at times, and it frequently becomes necessary for the president to attend to these matters, insomuch that in large banking institutions it becomes a matter of daily occurrence. The reasoning of the court of appeals (79 Fed. Rep., 298, 299) in this case seems to us unanswerable.

The cases relied on by counsel to support the proposition that the president has no inherent or implied power, are, as a rule, where the board of directors are specifically vested with full control and the president had taken no active part in the management of the business, as in the case of City Electric Street Railway *v.* First National Bank, 62 Ark., 33; S. C., 34 S. W. R., 89, where it was held that the statute expressly

vested the power to manage the business of the corporation in the board of directors, and it was shown that the secretary "and president had never indulged in a course of dealing between the corporation and third parties, so as to lead strangers to believe that they had power to issue negotiable paper in the name of the company," and the court in that case felt called upon in support of its opinion to remark that no usage could exist or be set up against the corporation in that case, because "the incorporation of electric street railways in the State of Arkansas is of comparatively recent date, and such corporations do not exist to any general extent throughout the State."

But the opinion in that case clearly draws the line which distinguishes that character of cases from the one at bar. It says:

"It must be remembered that the answer in this case denies *in toto* the authority of the president and secretary to issue negotiable paper. Hence, this case bears no analogy to that line of cases where the authority exists for some purposes, but is exercised for different purposes than that for which it was conferred. *Where the authority to issue negotiable paper exists at all in the president and secretary, then the innocent holder would have the right to assume that it was properly and lawfully issued.*"

In Putnam *v.* U. S., 162 U. S., 687, 713, cited by counsel, while the court holds that the president of a national bank *virtute officii* has not *necessarily* the power to draw checks against the account kept with another bank by the bank of which he is president, as against *the power conferred by the statute on the board of directors to define the powers of the president*, it does not hold that in the absence of any action by the board defining the powers of president, he may not draw checks, but says: *"True it is, that by a course of dealing with*

a particular person, the power of an officer to perform a particular act may be implied when such power is not inconsistent with law." Citing Merchants Nat. Bank *v.* State Nat. Bank, 10 Wall., 604.

The case of Mussey *v.* Eagle Bank, 9 Met., 306, 314, cited by counsel, stands alone in Massachusetts. It has not been followed by any other court, and is in conflict with the ruling of this court.

Merchants Bank *v.* State Bank, 10 Wall., 604.

Coke *v.* State Nat. Bank of Boston, 52 N. Y., 97, 117.

V.

The New York Bank had the right under the evidence to assume that the notes were owned by the Little Rock Bank and were being negotiated by Allis as president, on its behalf, and that he had authority so to do.

This is, to some extent, a concrete statement of the propositions already discussed, as applied to the facts in this case.

We submit, that no bank or business man of the most prudent habits would have exacted any other evidence of authority than that disclosed by the evidence in this case. But it is contended by counsel that the banks generally—and the New York Bank in particular—have not understood their business, and that a showing of special authority in Allis in this case should have been required. Suppose special authority had been required, what would it have amounted to. If Denney, who was the proper person, as cashier, to certify to any

resolution conferring authority, had been called on he could and would easily have furnished a copy of what purported to be a resolution. What protection would that have been more than that which will be given by the courts on account of his conduct, as disclosed by the evidence in this case? Nor would it have given any more protection to the Little Rock Bank, unless it held that the bank rediscounting paper for another bank must have an agent present at the meeting of the board of directors able to testify thereafter to what occurred. To apply the rule contended for by counsel in this case to the facts here disclosed by the record would be not only to overthrow a long line of decisions as to banking business, but to shake to their foundation principles heretofore considered settled beyond debate, in the law of corporations and agency.

In the leading case in England of Royal British Bank *v.* Turquand, 6 E. & B., 327 (Exchequer Chamber; reported below in 5 E. & B., 248), the question was raised as to the indebtedness of a corporation upon a loan made by its board of directors, whose authority to borrow depended upon the passage of a resolution at a general meeting of the company. The Exchequer Chamber, through Jervis, C. J., said (page 332):

> "We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."

It will be remembered that the deed of settlement of an English corporation is equivalent to the charter of an American corporation—an instrument filed in a public office so as to be accessible to the world at large. The information given there by the statute and deed of settlement as to the powers of a corporation and the limitations thereon, is that which is given with reference to a national bank by the statutes of the United States, and the articles of association which are filed with the Comptroller of the Currency. But as these articles are required, and can be expected to contain only the matters specified in Revised Statutes, section 5134, really the only source of information as to powers and limitations to be examined by one dealing with a national bank is the statute book. The effect of the decision just cited is that where the directors of a bank are exercising powers conferred by statute or charter only upon condition of previous authorization by the body of stockholders, one dealing with the directors may rightfully assume that the stockholders have given the necessary authorization; he is not required to demand an inspection of the minutes of the stockholders' meetings, or a certified copy of their action. It comes within the apparent scope of authority of the directors to rediscount notes; if the rediscount effected by them is beyond the actual scope of their authority, the loss must fall upon those who put them in office and enabled them to deceive the outside world. The rule thus applied to the actions of the directors is equally applicable to the actions of all other officers of the corporation. In short, if rediscounting paper be within the power of the corporation, and if the officer effecting a rediscount be the one through

whom, in the proper course of business, the transaction should be had, then the party taking the paper need not seek proof of special authorization. It is only an application of the general principle in the law of agency that knowledge of limitations upon the powers of a general agent must be forced upon, and not sought by, one who deals with him. The latest English case upon the subject is Biggerstaff *v.* Rowatt's Wharf, Limited, and Howard *v.* Same (1896), 2 Ch., 93. The decision was by Lords Justice Lindley, Lopes, and Kay in the court of appeals, and its importance and applicability to the case at bar justify us in stating it somewhat in detail. The defendant company was a corporation conducting a wharf. Its articles authorized the directors to appoint a managing director, and to confer upon him such of the powers of the board as they saw fit, other than the drawing, accepting or indorsing bills of exchange or promissory notes. Mr. Davy had been recognized and was acting as managing director, but there was nothing upon the directors' minute book to show either his appointment or what powers were conferred upon him. At the time of the transactions in question the board consisted of three members. On October 20, 1894, Harvey, Brand & Co. discovered that the defendant company had misappropriated sundry barrels of which it was warehouseman. On October 22, 1894, a meeting occurred between Harvey, Brand & Co. and the three directors of the defendant, at which the former threatened criminal proceedings, and demanded the transfer to them of sundry securities held by the company. The meeting was postponed to the next day, when one of the directors was absent; and representation being made that the

company had no money to pay wages, and must close the wharf unless they could get an advance, Harvey, Brand & Co., having interests which would suffer if the wharf were closed, agreed to advance the money for wages, upon getting security for the advance and for the moneys due them on the prior transactions. The managing director then gave them the security desired. On October 30, 1894, the defendant company went into the hands of a receiver; and at that time Harvey, Brand & Co. were indebted to it for storage. The cause is reported upon their claim to set off the moneys due them for the advance and the preceding misappropriation against the claim for storage, and to be paid moneys which had been collected by the receiver on claims hypothecated to them. Upon this subject the members of the court spoke as follows:

Lindley, L. J. (p. 102):

"It is said that the company is not bound by those orders (the assignments to Harvey, Brand & Co.), because Mr. Davy had no authority to give them. Now, what is the law as to this point? What must persons look to when they deal with directors? They must see whether according to the constitution of the company the directors could have the powers which they are purporting to exercise. Here the articles enabled the directors to give to the managing director all the powers of the directors, except as to drawing, accepting, or indorsing bills of exchange and promissory notes. The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him *bona fide*. It is settled by a long string of authorities that where directors give a security which according to the articles they might have power to give, the person taking it is entitled to assume that they had the power. The hypothecations, therefore, are, in my opinion, valid."

Lopes, L. J. (page 103), after discussing some other questions, says:

"The question as to the hypothecation of debts is quite distinct. It is said that the managing director had no power to hypothecate them. There is no doubt that Mr. Davy was managing director and acted as such, and, according to the articles, the directors could have given him the power which he purported to exercise. There is an absence of evidence that they have done so; but is that enough to make his acts void? In Lindley on Companies, 5th ed., p. 159, the law is thus laid down: 'Upon principle, therefore, where persons are in fact employed by directors to transact business for a company the authority of those persons to bind a company within the scope of their employment cannot be denied by the company, unless (1) their employment was altogether beyond the powers of the directors; or unless (2) the persons employed have been appointed irregularly, and those who dealt with them had notice of the irregularity. Where the power to appoint an agent for a given purpose exists, irregularity in its exercise is immaterial to a person dealing with the agent *bona fide* and without notice of the irregularity in his appointment. The following cases are important on this point: In Smith v. Hull Glass Co., 8 C. B., 668, 11 C. B., 897, it was held that a company registered under 7 and 8 Vict., c. 110, was liable to pay for goods ordered by persons in its employ, and that it was not necessary for the plaintiff to prove that those persons were authorized by the directors to order the goods in question. Maule, J., went further than this, and his judgment is an authority for the broad proposition that a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority; and that strangers dealing *bona fide* with such persons, have a right to assume that they have been duly appointed. This view is in accordance with later authorities.'

"Every word of that applies here. It cannot be said but that Mr. Davy was acting within the limits of his apparent authority, or that Harvey, Brand & Co. were not acting *bona fide*, or that they had not a right to assume that Mr. Davy was duly appointed."

Kay, L. J., said (page 106):

"Whether Mr. Davy had been formally appointed managing director does not signify; he acted and was recognized as such. By the articles the directors were authorized to delegate to him all their powers except the drawing, indorsing, and accepting bills of exchange and promissory notes. Mr. Davy, therefore, did nothing *ultra vires* of a managing director; and it would be extraordinary if a person dealing *bona fide* with the managing director of the company were bound to inquire whether the powers which the articles authorized the directors to give him had been formally delegated to him. There is a long string of cases showing that a person so dealing with an officer of a company has a right to presume that all has been done regularly. Mr. Cozens-Hardy then contends that Harvey, Brand & Co. were not dealing with Mr. Davy as managing director; that they were dealing with the whole body of the directors, with whom they had a meeting on October 22, at which nothing was concluded, and then next day a meeting was held at which a quorum of directors was not present. This, he contends, shows that it was not intended that anything should be done but by the body of directors. It seems to me that on the 23d it was considered that the arrangement had been virtually come to on the 22d, and no discussion seems to have taken place about the terms; the matter seems to have been treated as settled. The letters of hypothecation were signed by the managing director as such; and Harvey, Brand & Co. had a right to assume that he had authority to sign them. There was, therefore, a complete hypothecation."

The principles underlying the decision just quoted have been repeatedly affirmed by this court. Upon them rest the long line of decisions as to the effect of recitals in city and county bonds, which are so familiar that it will be necessary only to refer to the subject generally, and specifically to the case of Moran *v.* Commissioners of Miami County, 2 Black, 722, where (page 724) the opinion in Royal British Bank *v.* Turquand, 6 E. & B., 327, was quoted at length and approved. Upon this reasoning rests the decision in Merchants Bank *v.* State Bank, 10 Wall., 604, where the court, speaking through

Mr. Justice Swayne, in words which, with reference to the powers ordinarily exercised by cashiers and vice presidents of banks as shown by the present record, are fully applicable to the case at bar, said (page 644):

"Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.

"If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.

"The principle has become axiomatic in the law of corporations, and by no tribunal has it been applied with more firmness and vigor than by this court.

"Estoppel *in pais* presupposes an error or a fault and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences and cast the burden upon another. Smith was the cashier of the State Bank. As such, he approached the Merchants Bank. The bank did not approach him. Upon the faith of his acts and declarations it parted with its property. The misfortune occurred through him, and as the case appears in the record, upon the plainest principles of justice, the loss should fall upon the defendant. The ethics and the law of the case alike require this result.

"Those who created the trust appointed the trustee and clothed him with the powers that enabled him to mislead, if there were any misleading, ought to suffer rather than the other party.

"Smith, by his conduct, if not by his declarations, avowed his authority to buy the certificates and gold in question from the Merchants Bank, and the bank, under the circumstances, had a right to believe him."

The case of Barnes *v.* Ontario Bank, 19 N. Y., 152, is of acknowledged authority, and was cited with approval in Mer-

chants Bank *v.* State Bank, 10 Wall., 650. There the cashier of the defendant bank, without the authority or knowledge of its board of directors or other officers, had procured discount of its certificate of deposit issued without any deposit having in fact been made. The proceeds of the discount were placed to its credit with its New York correspondent, but no entry of any kind relating to the transaction appeared upon the books of the defendant bank. The court held the bank liable upon the certificate, and in the principal opinion it was said (page 156):

"The first questions presented are, whether the bank had power to borrow the money, and whether the cashier was a proper agent to execute that power without any special delegation of authority thus to act. That the power to borrow existed was determined by this court, upon the fullest examination, in the case of Curtis *v.* Leavitt, 15 N. Y., 9. That the cashier, in virtue of his general employment, could exercise the power, was not denied upon the argument, and the proposition does not admit of a reasonable doubt."

The counsel who argued the case were Francis Kernan for the bank, and Nicholas Hill for the certificate holder—two of the most prominent lawyers of that day in the State of New York. The principle there decided was again affirmed by that court in Coats *v.* Donnell, 94 N. Y., 168, where it was said (page 176):

"The cashier of a bank is its executive officer, and it is well settled that as incident to his office he has authority, implied from his official designation as cashier, to borrow money for, and to bind the bank for its repayment, and the assumption of such authority by the cashier will conclude the bank as against third persons who have no notice of his want of authority in the particular transaction, and deal with him upon the basis of its existence."

In Donnell *v.* The Lewis County Savings Bank, 80 Mo., 165, the plaintiffs were the same New York banking firm as in the previous case, and were again attempting to sustain a loan which they had made to a Western bank upon an obligation executed in its name by one of its officers without authority expressly delegated by its board of directors, viz, a note signed by the cashier individually, payable to the order of the bank and indorsed by the bank, through its president, which the plaintiffs had discounted, knowing it to be what bankers call "made paper," that is, paper without real consideration as between the parties, and made up merely to evidence the loan. The authority of the defendant bank to borrow money, and that of its officers to bind it upon such paper, were challenged and denied by the court below. This judgment was reversed, and the court sustained the authority of any corporation, having general banking powers, to borrow, and also the apparent scope of the authority of the cashier to execute such power, and that one dealing with him need not prove either special delegation or subsequent ratification. The opinion merely states the propositions with the conclusions reached, and refers for a fuller discussion to the case of Ringling *v.* Kohn, 6 Mo. App., 332, where similar questions were presented, saying (page 171):

"These positions are well supported by the numerous authorities cited and relied on by the court of appeals in its well considered opinion in said case, and we think state the law correctly, when applied to the facts in this case, as well as to that."

The facts in the latter case were, in brief, as follows: The cashier of the People's Savings Institution, a corporation hav-

ing general banking powers, borrowing from Kohn money in its name upon its demand note signed by him as cashier, pledging as security government bonds belonging to Ringling, which the bank held on special deposit; the cashier then absconded, being a defaulter in an amount much larger than the loan. The suit was by Ringling against the pledgee to recover his bonds. On the first trial Ringling recovered judgment, which was reversed upon grounds not material to the present discussion (4 Mo. App., 59). On the second trial Ringling again recovered judgment, the court below holding that the act of the cashier in borrowing the money did not bind the bank without proof of special delegation or subsequent ratification. In reviewing the judgment the court of appeals, after affirming the power of the bank to borrow money as being "a necessary and inherent privilege, inseparable from the exercise of its banking functions," and referring with approval to the decisions in City Bank *v.* Perkins, 4 Bosworth, 420, and Barnes *v.* Ontario Bank, 19 N. Y., 56, cited above, sustains the conclusions there reached, and sums up the matter in the following words:

> "We find no judicial authority for the proposition that when a cashier borrows for his bank, the lender will be imperiled unless a special power has been given."

We refer to the following decisions additional to these, and those already cited under other heads, as confirming the propositions heretofore made:

Smith *v.* Hull Glass Co., 11 C. B., 896.

Mahony *v.* E. Holyford Mining Co., L. R. 7 H. L., 869.

County of Gloucester Bank *v.* Rudry Merthyr, etc., Colliery Co. (1895), 1 Ch., 629; 12 Rep., 183.

Barwick *v.* English Joint Stock Bank, L. R., 2 Exch., 259, 266.

Swire *v.* Francis, L. R., 3 App. Cas., 106.

Montaignac *v.* Shitta, L. R., 15 App. Cas., 357.

In re Hampshire Land Co. (1896), 2 Ch., 743.

Creswell *v.* Lanahan, 101 U. S., 347.

Bank of Lakin *v.* National Bank of Commerce, 57 Kan., —; 45 Pac., 587.

Grommes *v.* Sullivan, 81 Fed. Rep., 45.

Bradley *v.* Ballard, 55 Ill., 413, 420.

Bank *v.* Griffin (Ill.), 48 N. E., 154.

Gilpeke *v.* Dubuque, 1 Wall., 175.

Galveston R. R. Co. *v.* Cowdry, 11 Wall., 459.

Merchants Nat. Bank *v.* Citizens Gaslight Co., 34 N. E., 1083.

Monument National Bank *v.* Globe Works, 101 Mass., 57.

Miller *v.* American Mutual Accident Ins. Co., 92 Tenn., 167; 20 L. R. A., 765.

N. Y. & N. H. R. R. Co. *v.* Schuyler, 34 N. Y., 64.

In reference to negotiable paper the rule is more liberal in favor of the power, and the courts go much further in the protection of innocent holders of the paper than in the case of ordinary contracts.

Merchants Bank *v.* State Bank, 10 Wall., 604, from which quotation has been made.

In National Bank of Republic *v.* Young, 41 N. J. Eq., 531, it was held that:

"When a corporation has power under any circumstances to issue negotiable paper, a *bona fide* holder has a right to presume that it was issued under the circumstances which give the requisite authority, and such paper is no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper."

In the case of American Exchange National Bank *v.* Oregon Pottery Co., 55 Fed. Rep., 265, the second ground of defense to the notes sued upon was "that the president and secretary of the defendant had no authority from the defendant, either by by-law or resolution, to execute the note, and that the defendant received no benefit therefrom, and did not ratify the same."

But the court said:

"The demurrer to the second defense, however, is well taken. The payee or indorsee of a negotiable promissory note, signed by the officers of a corporation as the note of a corporation, is not required to ascertain whether the officers have authority to make the note. A corporation framed under the general incorporation laws, for the purpose of conducting business, has, so far as the law is concerned, the same power that an individual has to contract debts whenever necessary or convenient in furtherance of its legitimate objects. It may borrow money to pay its debts. It may execute notes, bonds, and bills of exchange. The power to sign such paper may be conferred upon any officer. If the president and secretary sign, their authority is inferred from their official relation.

"All persons dealing with them have the right to assume that there is no restriction of that authority. They also have the right to assume, unless they have actual notice to the contrary, that a note so signed is made in the regular course of the business of the corporation. To hold otherwise would destroy the negotiability of all notes made by corporations. * * * In the absence of an allegation that the president and secretary of this corporation were deprived of power to make this promissory note, and that that fact was known to the payee of the note and the plaintiff before they became holders of the paper, the demurrer to this defense must be sustained."

1 Morawetz on Corporations, sec. 538, and note 1; 2 ib., sec. 602.

1 Daniels on Neg. Instruments, secs. 381, 386, 389, *et seq.*

Taylor on Private Corporations, sec. 204.

People's Bank *v.* Manufacturers Nat. Bank, 101 U. S., 181.

Smith *v.* County of Sac, 11 Wall., 160.

City of Lexington *v.* Butler, 14 Wall., 296.

Ellsworth *v.* R. R. Co., 98 N. Y., 553, and authorities *supra.*

VI.

As a matter of fact Allis did have power to rediscount and indorse for his bank.

Even if it be admitted that Allis, as president, had no inherent power it does not follow that record authority was necessary to enable him to rediscount. Authority might have been conferred by the by-laws, by resolution of the board of directors, or by the assumption of those powers with knowledge and acquiescence of the board of directors.

Cox *v.* Robinson, 70 Fed. Rep., 762.

Bank *v.* Dandridge, 12 Wheat., 70.

4 Thompson on Corp., sec. 4881.

Bank *v.* Graham, 100 U. S., 699.

Bank *v.* Atkinson, 55 Fed. Rep., 465.

Burton, Receiver, *v.* Busby, Receiver, 2 National Bank Cases, 134.

Bell *v.* Hanover Nat. Bank, 57 Fed. Rep., 821.

Simons *v.* Fisher, 55 Fed. Rep., 905.

At the risk of repetition, we desire here to refer in detail to the evidence which shows beyond question that Allis, with-

out objection from the board, if not with their positive assent, assumed and for a long time exercised the power to say where and what amount of rediscounts should be made, and the cashier and assistant cashier simply acted under his instructions. C. T. Walker, the former cashier, testified (Tr., pp. 48-50) as follows:

"Q. What was the custom of that bank at the time as to rediscounts?

"A. Well, these matters were usually referred to the president of the bank. *He directed me.* * * *

"Q. Then, whenever you needed rediscounts, you would refer that to the president?

"A. Yes, sir.

"Q. State now what he would do?

"A. He generally directed what amount and where to send them.

"Q. Then I understand he had control of the rediscounts?

"A. Yes, sir; they were referred to him.

"Q. Were these matters ever referred to the board of directors?

"A. I cannot say whether he referred them to the board or not. * * *"

CROSS-EXAMINATION:

"Q. These matters were referred back to the cashier in the end for the purpose of procuring the discounts? When discounts were determined upon, the cashier was the man who transacted the business, was he not?

"A. Well, most of that was done with Mr. Denney, the assistant cashier. I do not remember ever sending off a batch of them.

"Q. They were not done by the president (Tr., p. 70)?

"A. Well, before they were made at all.

"Q. Merely asked his advice in regard to it?

"A. Yes, sir; generally asked his *instructions.* * * *"

REDIRECT:

"Q. He did have the authority to direct the amount to be sent and when to be sent, and the cashier or assistant cashier acted under his instructions?

"A. Yes, sir. Either Mr. Denney or I would say to him that something of the kind was needed, and he would direct the quantity and what correspondents usually to send it to."

E. J. Butler, one of the directors (Tr., pp. 53, 54), testified that Allis never asked the board for power to make rediscounts. He knew rediscounts were being made, and signed reports to the comptroller showing rediscounts, but did not know the extent or amount of rediscounts made.

N. Kupferle, one of the directors and vice president, testified (Tr., pp. 55, 56), that nothing was ever said before the board about the power of Allis to rediscount; that the question was never brought before the board at all while Allis was president about rediscounting paper; that Allis acted as general manager of the bank and had general control; that he directed most of the business or all the business while he was there; that the cashier acted under his control, as a rule. Witness was about there and knew the power he exercised, and he used his power, of course. He could only recall that Allis or Denney ever called on the board for power to rediscount paper but once, when Allis, in the fall of 1892, "requested that the bank should borrow more money." Witness knew that the bank had been rediscounting paper long before, and no authority had been asked from the board, notwithstanding he knew "that they were borrowing money and rediscounting paper continually."

C. T. Abeles, a director, testified (Tr., pp. 58, 59) that

the authority of anyone to rediscount was never mentioned before the board, that he remembered while on the board. Knew that the bank was rediscounting paper, and that somebody was transacting that part of the business, but never inquired of Allis or Denney who was doing the rediscounting, or where they were doing it.

M. M. Cohn, one of the directors, testified (Tr., p. 82) that the question was never brought before the board as to who had authority to rediscount. The question never presented itself to his mind. Knew from the statements that rediscounts were being made. Did not know by whom, and did not stop to inquire.

Thus, it will be seen that the board did not attempt to exercise any supervisory control whatever over the matter of rediscounts and that that was left entirely to Allis and the cashier, if not to Allis alone. The fact that Allis was in control and directed the affairs of the bank, which was known to the directors, necessarily shows that they must have understood that he had charge of the rediscounts also. They could easily have known who was doing it, and they are chargeable with notice that Allis was exercising this power. In fact, the evidence of Kupferle shows that he must have known it. Hence, we have the power of Allis clearly established by the acquiescence and public holding out on the part of the board. In addition to that we have the course of dealing between the two banks from which the plaintiff had a right to presume that Allis had authority to make the rediscounts. But counsel says we did not establish the fact that Allis had ever indorsed the name of the bank upon paper before this. This was not neces-

sary, even if we admit that counsel is correct, because, when we establish his power to negotiate or direct the rediscounts to be made, as in this case, the power to indorse is necessarily implied. It would seem folly to allow full authority to direct and control the matter of rediscounts, and at the same time say he should not have power himself to rediscount for the bank, and the same is true in reference to the power to negotiate and indorse the paper.

In Merchants Bank *v.* Central Bank, 1 Ga., 418; S. C., 44 Am. Dec., 665, the court said:

"The power to discount confers the power to indorse, whenever an agent is empowered to do a particular thing he is also empowered to use the means necessary to accomplish it. The means are included in the power."

Story on Agency, sec. 77 (8th Ed., sec. 59).

Bailey on Bills (5th Ed.), Ch. 27.

Rumer *v.* Bank of Columbia, 9 Wheat., 584.

Cox *v.* Robinson, 70 Fed. Rep., 762.

In Bank of Genessee *v.* Patchin Bank, 13 N. Y., 309, Denio, J., said:

"The contract of indorsement is incident to the negotiation of negotiable paper and the right to transfer such paper includes the power to enter into the collateral contract which an indorser assumes."

But no other conclusion can be arrived at from the testimony in the case than that Allis did indorse the notes in behalf of the bank. Aside from the fact that he conducted, practically, all the correspondence which inclosed notes for rediscount, and must have indorsed many, if not all of them, and the fact that no question is made as to the validity of his action in reference to the two notes of the Dickinson Hardware Com-

pany, inclosed at the same time with the notes in controversy, and must have been indorsed by him, the signatures of the officers of the bank were inclosed in the first letter written by Allis (Tr., p. 17), and when his resignation was accepted and Kupferle elected in his stead the signatures of the officers were again sent to the New York Bank, and the signature of Kupferle substituted for that of Allis (Exhibits 57, and 58, Tr., p. 37). These signatures were intended for all purposes for which the name of the bank was to be signed. There can be no more difference in signing a draft or indorsing a bill of exchange than indorsing a note for rediscount. If it were material to show that Allis was authorized to indorse for the bank and did so, there can be no doubt from this evidence that the fact is fully established.

Crain *v.* First National Bank, 114 Ill., 516.

VII.

There is nothing in the form of the notes, or in the facts to charge the New York Bank with notice of the want of authority or fraud of Allis.

The case of West St. Louis Savings Bank *v.* Parmelee and the Shawnee County Bank, 95 U. S., 557, relied on by counsel, we submit, bears no analogy to this. There the cashier of the Shawnee Bank executed his individual note payable to the plaintiff bank, and indorsed the name of the Shawnee Bank upon it by himself as cashier. The consideration of the note was a loan to the cashier *individually*, of which the plaintiff at the time of taking the note had notice. The nego-

tiations were all between the plaintiff bank and the cashier of the defendant in his *individual* capacity, and it was not claimed that he at any time pretended that his bank was in anyway interested in the matter, other than merely an accommodation indorser.

The court said: "There is not a single circumstance tending in any manner to prove that the transaction was looked upon as a rediscount for the Shawnee Bank, except the entries in the books of the St. Louis Bank, and these are far from sufficient to overcome the positive testimony as to what the agreement actually was." The same may be said of the other cases cited.

In the case at bar there is no pretense that the New York Bank dealt with Allis in his individual capacity, or knew that he was individually interested. The proof is unquestioned that it dealt with him solely on behalf of the Little Rock Bank (Tr., p. 13). The only fact upon which the learned counsel bases his argument as to this point is that three of the notes were payable to Brown and Allis, and they all bore his personal indorsement. If we consider the two cases simply upon the face of the notes, without regard to any extraneous facts relating to knowledge of the individual interest of the officer of the bank using the bank's indorsement, still there is no analogy between them. The indorsement of the Shawnee Bank was made upon a note of its cashier payable directly to the West St. Louis Savings Bank.

In the very nature of the case the West St. Louis Savings Bank must have known that the Shawnee Bank was a mere accommodation indorser. But in the case at bar Allis's in-

dorsement upon the notes could be notice of nothing more than that Allis had at one time owned the notes and discounted the same at the First National Bank; and as to the McCarthy & Joyce notes it need not necessarily imply anything more than an accommodation indorsement. Neither would imply that he was acting in any way for his personal benefit or that he had any interest in the proceeds of the notes.

On the face of the notes three of them appear to have passed from Brown and Allis to the bank, and two of them from Allis to the bank, or, if we treat Allis as an accommodation indorser, from James Joyce to the bank. *The bank was the ostensible owner of the paper. The notes were discounted for account and placed to the credit of the bank. Everything which Allis did, to all appearances, was for and in the interest of the bank and not for himself.*

As said by the court of appeals (64 Fed., 989): "Such being the undisputed facts of the case, in deciding as to what information was given to the plaintiff by the form of the notes, we must apply the well known rule that a person purchasing negotiable paper is entitled to assume, in the absence of knowledge to the contrary, that the actual relation of every party thereto and his interest therein is what it seems to be from the face of the paper. In the present case the notes, when presented to the plaintiff for discount, were so drawn and indorsed as to create a presumption on which the plaintiff was entitled to act, that they had been indorsed by Allis to the Little Rock Bank, and that the bank was the holder for value. And this presumption created by the notes themselves, was confirmed

by the correspondence between the two banks in relation to the proposed discount to which we have heretofore adverted."

The cases cited by counsel are all clearly distinguishable from this. The distinction is satisfactorily indicated in the case of Bank *v.* Hume, 4 Mackay, 103, where the action was on the following note:

"$1,200.

"Washington, D. C., September 27, 1881.

"Thirty days after date I promise to pay to the order of Frank Hume $1,200, value received, with 8 per cent interest until paid, payable at Second National Bank.

Indorsed: THOMAS L. HUME.

Frank Hume.
Hume, Cleary & Co."

The court said:

"In the further progress of the cause, there was evidence offered on the part of the defendants, and admitted subject to exception for the purpose of showing that the note had never been the note of the partnership or of the first indorser, and that no value had been received for it by either of the parties subsequent to the drawer, and further, that the note was discounted by the drawer at the bank for his own benefit, and was treated throughout by the bank and the drawer (although the drawer was one of the parties composing the firm), as his own property.

"It was proper upon that form of proof to submit the whole case to the jury to determine, as a matter of fact, whether the holder of the paper, at the time he discounted it on behalf of the drawer, was dealing with the drawer in his individual capacity or was dealing with him as a member of the firm for the benefit of the firm. Occupying the double character of drawer of the note and also one of the members of the firm indorsing the note, it would have been competent for him, notwithstanding the unusual form of the note, to have treated it as a note offered for discount by him in his character as a member of the firm for the benefit of the firm; *and if he*

had professed to be dealing with the discounting bank in his character as a member of the firm for the benefit of the firm, the form of the paper when it stands thus in the peculiar dual relation of a partner so dealing, would not have been as in the case in the 95th U. S.—the cashier of the Shawnee Bank dealing with the paper of the bank—satisfactory proof that it was only accommodation paper on the part of the bank who was put there as an indorser, and that the party was therefore charged legally with knowledge and notice of the infirmity of it and bound to see whether the accommodation indorsement was for the benefit of the party offering it and duly authorized; but, on account of his dual character, he would still have had the right to deal with it as a partnership paper if he had so dealt with it.''

Also in Central Trust Company *v.* Cook County National Bank, 15 Fed., 885, "where a party discounts a note given by the president of a bank, with the indorsement of the bank thereon, supposing that he is dealing with and advancing the money to the bank, and not the president personally, the bank will be held liable for the payment of such note." Distinguishing Claflin *v.* Farmers Loan and Trust Company, 25 N. Y., 293, relied on by counsel.

Freeman's Nat. Bank *v.* Savery, 127 Mass., 78.

Kaiser *v.* First Nat. Bank, 78 Fed., 281.

There is nothing in the law or in the usage of banks so far as we have been able to ascertain which prohibits a bank from discounting the paper of one of its officers, and if there is, this fact would only be calculated to arouse a suspicion at most.

But something more than suspicious circumstances are required to put the purchaser of negotiable paper upon notice. Its free and untrammeled circulation is universally favored by the courts, and he who would successfully attack the title

of the indorsee for value before maturity, must bring to him the *knowledge of facts*, which would convict him of bad faith in securing the indorsement. Even gross negligence will not defeat his right of recovery.

The rights of the holder are to be determined by the simplest test of honesty and good faith; and not by a speculative issue as to diligence or negligence. He owes no duty of active inquiry.

This is the rule established and steadfastly adhered to by this court, and is supported by most if not all the State courts and in England.

In Murray *v.* Lardner, 2 Wall., 122, 123, the court said:

"Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it. The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith."

In Hotchkiss *v.* National Shoe and Leather Bank, 21 Wall., 360, the court said:

"The law is well settled that a party who takes negotiable paper before due for valuable consideration, without knowledge of any defect of title, in good faith, can hold it against the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or willful ignorance, and the burden of proof lies on the assailant of the title."

In Hopkins & Hammond *v.* Withrow, 42 Ill. App., 584, held that:

"Suspicion of defect of title or the knowledge of circumstances which excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, will not defeat his title. *Bona fides* should be the decisive test of the holder's rights."

In Wilson *v.* Dent, 18 S. W., 622 (82 Tex.), the court said:

"The ordinary rule of constructive notice which applies to the purchase of property is not applicable in the case of negotiable instruments. As promotive of circulation, a liberal view is taken, which makes the *bona fides* of the transaction the test of the holder's right. He is entitled to recover upon it if he has come by it honestly."

"Before an indorsee's title to a negotiable note can be impeached on account of notice of fraud, he must have actual notice of the facts which impeach the validity of the paper, and such circumstances as would likely arouse suspicion or put a prudent man on inquiry will not suffice."

First Nat. Bank of Cameron *v.* Stanley, 46 Mo. App., 440.

In Richardson *v.* Monroe (Iowa), 52 N. W., 340, held that:

"It is error to instruct the jury to the effect that when the purchaser of a negotiable promissory note for value, before maturity, has such knowledge of infirmities in the note as would put a man of ordinary prudence on inquiry, he will be held to have notice of any defects that exist."

The court said:

"Such is certainly not the rule in this State. 'The early and present doctrine is that the right of a *bona fide* holder for value, in the usual course of business of negotiable paper, cannot be defeated by proof that he was negligent and omitted to make inquiries which common prudence would have dictated.' * * * In Pond *v.* Agricultural Works, 50 Iowa, 600, it is said: 'To charge the holder

of a negotiable promissory note with notice of infirmities, he must have been guilty of something more than mere negligence in taking the note. Indeed, gross negligence, it is said, is not sufficient, and that nothing but fraud is sufficient to destroy the character of the holder as one who acted in good faith.' "

See also

Kaiser *v.* First Nat. Bank, 78 Fed., 281.

Thompson *v.* Love, 61 Ark., 81.

Goodman *v.* Simonds, 20 How., 343.

Swift *v.* Smith, 102 U. S., 442.

King *v.* Doane, 139 U. S., 166.

Comstock *v.* Hannah, 76 Ill., 530.

Magee *v.* Badger, 34 N. Y., 247.

Belmont Branch Bank *v.* Hoye, 35 N. Y., 65.

Seybil *v.* National Currency Bank, 54 N. Y., 288.

The court of appeals, in passing upon this feature of the case, has well said (64 Fed., 990):

"In the suit at bar, the defendant bank itself offered the notes in suit for rediscount; the request for the discount was made by its president and cashier, each acting in an official capacity; the offer was accompanied with a satisfactory excuse for asking a rediscount—such an excuse as would naturally disarm suspicion. Moreover, the paper offered for rediscount appeared to have been regularly indorsed to the defendant bank; it was ostensibly in its possession, and the proceeds of the discount were passed to its credit, and were subsequently paid out on its checks. Under these circumstances, it cannot be said that the plaintiff acted in bad faith or that it was affected with notice that the Little Rock Bank was merely an accommodation indorser."

VIII.

The burden was upon the Little Rock Bank to show that the New York Bank took the notes with such knowledge of the fraud of Allis as amounts to bad faith on its part.

We take it to be the settled doctrine of the Supreme Courts of the United States and of Arkansas, that when the defense of fraud or want of authority is interposed to a suit by one to whom a negotiable note has been transferred, and the fraud is proven, the holder is required to prove that the note was acquired before maturity, and for value, and the burden is then thrown upon the defendant to prove that the holder of the note had notice of the defect.

Swift *v.* Tyson, 16 Pet., 1.

Goodman *v.* Simonds, 20 How., 343.

Carpenter *v.* Logan, 16 Wall., 271.

Murray *v.* Lardner, 2 Wall., 110.

Collins *v.* Gilbert, 94 U. S., 753.

King *v.* Doane, 139 U. S., 166.

Smith *v.* Sac County, 11 Wall., 139.

Press Co. *v.* City Bank of Hartford, 58 Fed., 321.

Taber *v.* Merchants Bank, 48 Ark., 454.

Counsel argues that this rule has no application to this case, because, as he says, the New York Bank must first establish the authority of Allis.

But the rule contended for by counsel is applicable only to a case where the power cannot be exercised as some of the courts say, "under any circumstances," or as others would say,

"under ordinary circumstances" (81 Fed., 47), and where no presumptions arise from the position or acts of the agent. Even the extreme cases cited by counsel on the question of the authority of an officer recognize this, as in Lamb *v.* Cecil, 28 W. Va., 659, where the court, speaking of the power of the cashier to indorse for rediscount, said:

"It is a matter which does not come within the ordinary duties of the cashier, and is not one of his inherent powers, but inasmuch as it is a power which is exercised by him under some circumstances, a transfer of such bills and notes made by him in the usual course of business of the bank to a person who has no reason to doubt the propriety of the transfer or to question its good faith, will be *prima facie* valid and vest a good title in the transferee. The validity of the transfer in such case will be sustained upon the ground that the transferee had a right to presume that the cashier had from the board of directors either an express or implied authority to make the transfer, and not because he had by virtue of his office inherent power to do so. Hoyt *v.* Thompson, 1 Seld., 320; Hartford Bank *v.* Barry, 17 Mass., 97; Smith *v.* Lawson, 18 W. Va., 212."

And as said by the court in City Electric Street Railway Company *v.* First National Bank, 62 Ark., 41:

"Where the authority to issue negotiable paper exists at all in the president and secretary, then the innocent holder would have the right to assume that it was properly and lawfully issued."

Grommes *v.* Sullivan, 81 Fed. Rep., 45-47.

Lanning *v.* Lockett, 10 Fed. Rep., 451.

We have taken these quotations from the two extreme cases cited by counsel; others more liberal might be found. If these quotations correctly state the rule, then it devolved on the Little Rock Bank not only to show that the authority or apparent authority of Allis had been restricted, but that the

New York Bank had knowledge of that fact and that Allis was acting in fraud of his authority.

We submit, however, that even if the burden should be upon the New York Bank, it has fully met it by the proof.

IX.

The eceiver is estopped to set up fraud or want of authority on the part of Allis.

Nothing is better settled in law than that a corporation may be estopped by its conduct, or that of its officers, the same as an individual.

In Merchants National Bank *v.* State National Bank, 10 Wall., 604, the court said:

> "Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of *ultra vires* has no application. * * * Corporations are liable for the acts of their servants while engaged in the business of their employment, in the same manner and to the same extent that individuals are liable under like circumstances. * * * Estoppel *in pais* presupposes an error or fault and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune should not himself escape the consequences and cast the burden upon another. * * * Smith was the cashier of the State Bank. As such he approached the Merchants Bank. The bank did not approach him. Upon the faith of his acts and declarations it parted with its property. This misfortune occurred through him, and as the case appears in the record, upon the plainest principles of justice, the loss should fall upon the defendant. The ethics of the law of the case alike require this result. Those who created the trust, appointed the trustee and clothed him with the powers that enabled him to mislead, if there was any misleading, ought to suffer rather than the other party."

This case is strongly analagous to the one at bar. The plaintiff bank did not approach the First National. That bank, through its cashier, requested plaintiff to make the discount. This request was acceded to in a letter addressed by plaintiff to Denney, the cashier of the First National. Allis, as president, forwarded the notes in a letter referring to the previous correspondence in reference to the same, and the plaintiff, in accordance with the usual custom, telegraphed the First National that the discount had been made, and also addressed to that bank a letter to the same effect, specifying particularly the notes discounted. But this is not all. Plaintiff at the same time returned one of the notes forwarded by Allis for correction, and Denney, the cashier, at once returned the same corrected in a letter, in which he not only failed to raise any objection to the validity of the transaction, but ratified it in that he says: "We charge your account with $31,871.27, proceeds of $32,500 discounts." If, as said by the court of appeals (64 Fed., 990), the letters of Denney and Allis asking for the discount, were accompanied with "such an excuse as would naturally disarm suspicion," what must be said of this last letter of Denney. If, as contended by counsel, Denney, as cashier, was the chief executive officer of the bank, it was his duty to notify plaintiff at once of any fraud or irregularity in the matter. And even if the plaintiff had not the right before this to assume that all was right, it had the unquestioned right after reception of this letter to assume that the regularity of the transaction was beyond question.

In the case of Butler *v.* Cockrill, 73 Fed. Rep., page 951, the court said:

"A corporation is bound to a careful adherence to truth in its dealings, as much as an individual. It cannot take advantage of its own wrong to benefit itself, and to defeat the just calculations of innocent third parties, who have acted in reliance upon its representations and conduct. It is governed by the well settled rule that 'One, who by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence, induces another to believe certain facts exist, and the latter rightfully acts on such belief, so that he will be prejudiced if the former be permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial.' "

Zabuski *v.* Cleveland and R. R. Co., 23 How., 469.

In the case of Bank of United States *v.* Bank of Georgia, 10 Wheat., 333, the Bank of Georgia having originally issued the bank notes in question in that case, they were, in the course of circulation, fraudulently altered, and having found their way into the Bank of the United States, the latter presented them to the former, who received them as genuine, and placed them to the general account of the Bank of the United States as cash by way of general deposit. The forgery was not discovered until nineteen days afterwards, upon which notice was duly given, and a tender of the notes was made to the Bank of the United States and by them refused. Both the parties were equally innocent of the fraud, and it was not disputed that the Bank of the United States was holder *bona fide* for a valuable consideration.

Held, that the Bank of Georgia was estopped and could not recover against the Bank of the United States on account of the spurious notes.

In Leather Manufacturers National Bank *v.* Morgan, 117 U. S., 96, it was held:

"1. When a bank depositor sends his pass book to the bank to be written up, it is his duty upon its return, either in person or by duly authorized agent, to examine the account and vouchers returned within a reasonable time, and give to the bank timely notice of any objections thereto. If he fails so to do, he may be estopped from questioning the conclusiveness of the account. 2. If the examination is made by an agent, it must be done in good faith and with ordinary diligence; and where such agent himself commits forgeries which mislead the bank and injure the depositor, the latter is not protected, in the absence of at least reasonable diligence in supervising the conduct of the agent."

Wing *v.* Commercial and Savings Bank, 61 N. W., 1009.

Ditty *v.* Dominion National Bank of Bristol, Va., 75 Fed., 769.

The conduct of Denney in this case was not merely negligent—he acted with positive knowledge of the facts. The defendant bank is liable for his conduct. It cannot plead innocence.

Nevada Bank of San Francisco *v.* Portland National Bank, 59 Fed., 338.

Fisher *v.* U. S. National Bank, 64 Fed., 710.

Aside from the positive knowledge which Denney had of all the transactions with the plaintiff, there is no dispute but that all the previous transactions and all the correspondence relating thereto, were of record in the Little Rock Bank, and with one exception the correspondence in reference to the transaction in question, was on file in that bank. Colonel Roots, in his letter to the New York Bank (Exhibit 70, Tr., p. 41), says he cannot find a copy of Allis's letter transmitting the notes on file; but it does not follow from this that a copy never was on file. However that may be, there is no question

but that the letter of the New York Bank in reference to the discount was on file, as well as the previous letters of Denney, and the one dated December 20, in answer to plaintiff's letter of December 16, and the correspondence as to all previous transactions. This correspondence all showed the true nature of the transaction. Moreover, the board of directors, according to the testimony of its members, had abandoned all supervisory control of rediscounts, and left it to the president and cashier, who had for a long time attended to it. The board cannot plead ignorance as to the manner in which this part of the business was carried on. It was their duty to know. They should, at least, have exercised due diligence to see that the officers to whom they intrusted the business of the bank attended to it properly. Besides the course of dealing, which had grown up and been in existence for several months, between the two banks, was an open book, of which the directors might easily have known, and of which they should have had knowledge.

In Martin *v.* Webb, 110 U. S., 7, 15, the court said:

"Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of the business, and to exercise reasonable control and supervision of its officers. They have something more to do than from time to time to elect the officers of the bank and make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

In First National Bank *v.* Fourth National Bank, 56 Fed., 967, it was held, that:

"A bank is charged with notice of letters duly mailed to it and received by the general bookkeeper, whose duty it is to open and distribute mail matter, although he conceals such letters to hide certain irregularities in his office, and thereby prevents their coming into the hands of the other bank officers."

In Ditty *v.* Dominion National Bank, 75 Fed., 769, the president having embezzled funds of the bank on deposit with its reserve agent, replaced the same with money borrowed by him on the bank's note, without the directors' knowledge, and such money was thereafter drawn out to pay the bank's lawful debts. The court said:

"In our opinion, even if the president may not have had authority to effect the loan, yet when he, in order to conceal his previous embezzlements, deposited the sum to the credit of the bank with its reserve agent in New York, and it was checked out for the benefit of the bank, the bank and its board of directors were affected with the knowledge which Overman, as its president, had of the receipt of the moneys. Having received the benefit through an agent, it is affected with the burden of the notice which that agent had of its reception, and therefore it became liable for money had and received to its use from the Dominion National Bank. We think the same principle applicable in this case which was applied in the case of Atlantic Cotton Mills *v.* Indian Orchard Mills, 147 Mass., 268; 17 N. E., 496. In that case the treasurer of two corporations was a defaulter in both positions. The defalcations were of long standing, and to avoid discovery at the annual settlement of the company, he drew checks of the other, and deposited them to the credit of one company in bank. On subsequent investigation, the question was whether the company whose bank account had been swelled by the checks of the other, was a debtor to the other for the deposits thus made by the common treasurer. It was held that the company receiving the money, having received it through the sole agency of the man who knew it to be stolen, could only take it with the burden of his knowledge. So, in this case, the bank having received the money through the agency of its president, could not retain it without assuming the burden of the president's knowledge as to how it came to be obtained. We do

not see that the circumstances, in that case, that the treasurer stole the money, and in this, that the president obtained it by false representation that he was authorized to borrow it for the bank, makes any reasonable distinction between the two cases."

4 Thompson on Corp., secs. 4608, 5210, 5224.

Scripture *v.* Francestown, etc., Co., 50 N. H., 571.

Bell *v.* Hanover Nat. Bank, 57 Fed., 821.

Jones, McDowell & Co. *v.* Ark. Mech. & Agrl. Co., 38 Ark., 17.

Lane *v.* Bank, 9 Heisk. (Tenn.), 437.

If, as contended by defendant, Denney was the chief executive officer of the bank, his action in soliciting the discount of plaintiff which was consummated through Allis, and his approval thereof after being notified of it, were such that the plaintiff bank had a right to rely upon as showing the transaction to be correct. According to the testimony of the members of the board, if Allis had no authority to make the rediscounts, Denney had, because the power was conceded by the board to one or both of them, and if conceded to Denney, he had all the powers of the board in that respect, and was the proper person for the plaintiff to apply to for the confirmation or verification of the authority of Allis, in fact by his letters before and after the discount, Denney was a party to the transaction. Had the plaintiff applied to him to know what authority Allis had to transmit the notes and indorse them, it could not have had from him a more positive affirmation of Allis's authority than in his letter and conduct after the receipt of plaintiff's telegram and letter notifying the Little Rock Bank of the rediscounts.

Wilson *v.* Metropolitan Ry. Co., 24 N. E., 384; S. C., 120 N. Y., 145.

The Distilled Spirits, 11 Wall., 356.

If the board of directors knew nothing of the matter it was because they had failed to perform their official duty and intrusted it to the cashier or president. In Fishkell Savings Institution *v.* National Bank of Fishkell, 80 N. Y., 162; S. C., Am. Rep., 595, the cashier of the national bank was also treasurer of the savings bank. He took bonds belonging to the savings bank, and as cashier and manager of the national bank, pledged them as security for advance to the national bank, and they were afterwards sold by the pledgees and their proceeds were credited to the national bank. Held, that the national bank was liable although the directors of the national bank were ignorant of the transaction; the court said:

"I do not think the case for the plaintiff would be any stronger if the actual concurrence of the directors in the cashier's fraud was established. If they were ignorant of it, it is because they omitted the performance of official duty, and so were not less bound than if the ignorance was intentional, that they or the bank they represent might profit by it. This the law will not tolerate."

In First National Bank of Kalamazoo *v.* Stone, 64 N. W., 488, the court said:

"Courts will presume that the directors knew what by due diligence they might have known."

The proceeds of the rediscounts went to the benefit of the Little Rock Bank.

It will be remembered that the proceeds of the notes were credited to the account of the Little Rock Bank with the New York Bank, and were checked out of that account by its

authorized checks, and so went to pay its valid liabilities. Every dollar of the proceeds of the notes went to the use of the Little Rock Bank, and if the proceeds of the notes had not been credited, the same checks having been presented, the Little Rock Bank would have been indebted to the New York Bank in the same amount by way of overdraft. No dispute or controversy can arise upon the record with reference to these facts; the only question is whether their legal effect is in any way altered by the fact that on the next day after the proceeds of the notes had been credited in New York, Allis took credit in Little Rock for the same amount. The New York Bank was in absolute ignorance of what Allis had done in Little Rock, and never had any means of knowledge until the facts were developed after the Little Rock Bank failed. This was not true as to the Little Rock Bank and its directors; for knowledge of what Allis had done (as we have seen) was actually within the possession of Denney, the cashier, and also of the bookkeeper, and the information given by the previous correspondence of the two banks and by the telegram (Exhibit 24, Tr., p. 27), and the letter (Exhibit 23, Tr., p. 26) of the New York Bank giving notice that the notes had been rediscounted for the Little Rock Bank, and the charge tickets made by Allis (Tr., p. 63) against the proceeds of the notes, remained on file always accessible. Not only was there negligence and positive wrong on the part of Denney in not raising objection to the transaction instead of affirming it, as we have seen, but the bookkeeper, who testifies so expertly, should have raised objection to the credits being entered in Allis's

favor on the books of the Little Rock Bank. It is of course not an unusual thing for funds to be transferred and credits to be given by book entries, but such transactions should be made only upon proper information and authority. And it is a most remarkable thing that such a thing should be done on the order merely of him who receives it. When the credit was entered by the New York Bank, the proceeds of the notes became the property of the Little Rock Bank.

3, 435-444 Anderson *v.* Kissman, 35 Fed. Rep., 699, 705.

It may be the duty of a clerk, from a banker's point of view, to make every entry which his superior directs him to make; in other words, he may be a mere machine. But we should dislike to be upon the bond of a clerk who took that view of his duties. Assuming, however, that in the interest of due subordination, it is proper for a clerk to make entries directed by his superior in the interest of that superior, and without proof other than his word, it certainly is further his duty to report what he has done to some other superior. The proposition is, we think, self-evident. As between the New York Bank and the Little Rock Bank, the knowledge of the bookkeeper and of Denney, was notice to the Little Rock Bank of what Allis had done.

First National Bank *v.* Fourth National Bank, 56 Fed. Rep., 967.

Armstrong *v.* Chemical National Bank, 83 Fed. Rep., 556.

We have heretofore called attention to the inconsistency of the position taken by counsel in that while arguing that Allis, as president, only had the power of a presiding officer

over the board of directors, and did not even have the power to indorse for the bank, he does not call in question his power to cause this credit to be entered in his own behalf. We only wish at this place to emphasize the fact as showing what power Allis did exercise and that the board of directors did know, or ought to have known, of this exercise of power.

Had the Little Rock Bank exercised one-half the degree of care which counsel invokes against the New York Bank, no loss to anyone would have occurred. For while it may be true that Allis acted without authority in rediscounting this particular paper, the New York Bank paid the *actual proceeds of it* to the Little Rock Bank, and the latter bank is alone to blame for the fact that Allis caused the same *amount* to be entered to his credit on the books of the Little Rock Bank. But it matters not what Allis did at Little Rock. His transactions there are not and cannot be connected with the transaction in New York. The New York Bank was in no way connected with them.

The result of Allis's conduct is not changed by the attempt of counsel and his bookkeeper to label the transaction as a "transfer of funds," or a "switching of balances." What Allis did has no legal effect different from that which would have arisen if he had actually taken the same amount of money from the vaults of the Little Rock Bank. Had the transaction assumed that form, we presume counsel would not venture to contend that Allis individually, and not the Little Rock Bank, had received the proceeds of the notes. It would be the ordinary case of a thief embezzling and using his master's name to replace the amount embezzled; or first,

using his master's name and embezzling afterwards. The difference in order is immaterial; in each case the master is responsible for the money which the thief obtains in his name, if *that money* goes into the master's coffers and is used by him.

The case is identical in principle with the case of Ditty *v.* Dominion National Bank, 75 Fed.

The weightiest English case upon this subject is that of Marsh *v.* Keating, 2 C. & F., 250, decided by the House of Lords upon the opinion of all the judges. The opinion of the judges is also reported in 1 Bing. N. C., 198, and 1 Scott, 5. While the statement of facts is quite voluminous, we believe the following is a fair summary, and gives the gist of the matter. Keating, the defendant in error, was the owner of registered government annuities, transferable at the Bank of England; Marsh, Fauntleroy, and others, were partners doing a banking business, under the name of Marsh & Co.; Fauntleroy forged the signature of Keating to a power of attorney to transfer the annuities, under which they were sold and transferred on December 29, 1819, and the proceeds deposited with Martin & Co., bankers, to the credit of the account of Marsh & Co.; the deposit was entered in the pass book of Marsh & Co. as "Cash per Fauntleroy," his name denoting the person who made the deposit; this pass book was the usual book kept by the depositor in which the bank enters its deposits as made, and which it balances from time to time; while a book of the firm of Marsh & Co., Fauntleroy was usually permitted by them to keep it locked up in his own desk; a corresponding entry should, of course, have been made in the other books of Marsh & Co., as they should have corresponded

with the pass book, but was not; nor did this credit ever appear upon the other books of Marsh & Co.; Marsh & Co. drew upon Martin & Co. by drafts signed in the firm name, but Fauntleroy paid in, and by such drafts drew out large sums for his individual purposes; the account between Marsh & Co. and Martin & Co. was repeatedly balanced between December 29, 1819, and September 13, 1824, when Marsh & Co. became bankrupts, this and other forgeries of Fauntleroy having been discovered; in the meantime Fauntleroy had caused the books of Marsh & Co. to be so kept as to show a credit to Keating of dividends upon all her annuities, including those which had been sold as above mentioned, as the same became due; all of the partners of Marsh & Co., other than Fauntleroy, were ignorant of his frauds until after their bankruptcy. The suit was to establish the claim of Keating against the assets of Marsh & Co. for the proceeds of the sale made by Fauntleroy under the forged power of attorney as for money had and received, and was prosecuted in her name for the benefit of the Bank of England. The judges having been called in, their unanimous opinion was given by Park, J.; in this opinion he disposes of the question which is of interest here in the following manner (2 C. & F., 288):

"But it is objected, thirdly, that the proceeds of the sale of the stock never came into the hands of the defendants, so as to be money received by them to the use of the plaintiff; and the consideration of this objection involves two questions: First, did the money actually come into the possession of the defendants? Secondly, if it ever was in their possession, had the defendants the means of knowledge, whilst it remained in their hands, that it was the money of the plaintiff, and not the money of Fauntleroy? As to the first point, the special verdict finds expressly that Simpson, the broker, paid the sum

of 60,131*l.* 2*s.* 6*d.*, being the amount of the sum received from Tarbutt (deducting one-half of the usual commission), by a check payable to Marsh & Co. into the hands of Martin & Co. to the account of Marsh & Co., at the precise time of such payment; therefore, there can be no doubt but that it was as much money under their control as any other money paid in at Martin & Co.'s by any customer under ordinary circumstances. The house of Marsh & Co. might have drawn the whole of the balance into their own hands; if the same money had been paid into Martin & Co.'s as the produce of the plaintiff's stock sold under a genuine power of attorney, it would unquestionably have been received by all the defendants to the use of the plaintiff. It would not the less be money received by the partners of the firm, because (as found in the special verdict) it was entered in the account as 'Cash per Fauntleroy,' or because it never appeared in the house book, or any other books of Marsh & Co., but only in the pass book of that firm with Martin & Co., or because it never came into the yearly balancing of the house of Marsh & Co., or in any other manner into their books. Those several circumstances prove no more than that Fauntleroy, one of the partners, deceived the others, by preventing the money from being ultimately brought to the account of the house; but as between them and the person by the sale of whose stock it was produced, we think the fraud of their partner Fauntleroy, in the subsequent appropriation of the money, affords no answer after it has once been in their power; and that it was so, appears to be distinctly stated in the special verdict.

"But it is urged, that the present defendants had no knowledge that the money was the property of the plaintiff, being perfectly ignorant, as the special verdict finds, of the commission of the forgery, of the sale of the stock, or the payment of the produce of such sale, into their account at Martin & Co.'s.

"It must be admitted that they were so far imposed upon by the acts of their partner, as to be ignorant that the sum above mentioned was the produce of the plaintiff's stock; but it is equally clear that the defendants might have discovered the payment of the money and the source from which it was derived, if they had used the ordinary diligence of men of business.

"If they had not the actual knowledge, they had all the

means of knowledge; and there is no principle of law upon which they can succeed in protecting themselves from responsibility, in a case wherein, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires."

Then, after disposing of another point, the opinion concludes:

"Upon the whole, therefore, we beg to state our opinion to be, that, upon the question which has been proposed to us by your lordships, A has the right to recover the produce of her stock against the surviving partners of the firm, who received it under the circumstances stated in the special verdict in an action for money had and received to her use."

We submit that this case is on all fours with the case at bar. There Fauntleroy swelled the bank balance to the credit of his firm by disposing of another's property, embezzled the money, and successfully concealed his fraud until his firm went into bankruptcy—concealed it, however, through the neglect of his associates in not examining their bank pass book through which his proceedings might have been traced. Here Allis did exactly the same thing, only in place of depositing money secured by selling the property of a customer of a firm, he deposited money secured in the bank's name from a customer of the bank. The letters describing the notes rediscounted, and stating that they were discounted for the account of the Little Rock Bank sent by the New York Bank answer in all respects to the pass book entered up by Martin & Co. There was a deposit to the credit of the firm with which the rogue was connected, notice of that deposit, and embezzlement by the rogue. The only difference between the cases is one which should *a fortiori* cause the rule applied

there to be applied here, *i. e.*, that there the embezzlement was made by checking directly upon the account where the deposit was entered, while here the embezzlement was made in an entirely different place, and without drawing upon the bank where that deposit was made.

The same question was before the Queen's Bench Division in the case of Reid *v.* Rigby & Co., (1894), 2 Q. B., 40; 10 Rep., 280, and was decided in the same way.

Substantially the same question was before this court in the case of the Merchants Bank *v.* State Bank, 10 Wall., 604, which has been already so frequently alluded to. And it came before the court again in an outgrowth from that transaction in United States *v.* State Bank, 96 U. S., 30. While the litigation between these two banks was pending, they had both brought suit against the United States to recover upon certificates of deposit for the gold there in controversy, which had been issued from the subtreasury at Boston through a fraudulent conspiracy of Mellen, Ward & Co. and Hartwell, the cashier of the subtreasury. Hartwell had embezzled from the subtreasury a large amount, and lent it to Mellen, Ward & Co.; anticipating an examination, the certificates referred to in the case of Wallace were procured and deposited at the subtreasury, so as to cover up his deficit. The United States attempted to maintain its hold upon the certificates because of the prior frauds of Hartwell, but failed. The supreme court, having sustained the title of the State Bank and its liability as between the two banks, further sustains its title as against the United States, and after alluding to the cases of Atlantic Bank *v.* Merchants Bank, 10 Gray, 532, and Skinner

v. Merchants Bank, 4 Allen, 290, as being strikingly like the case before them, continued (Tr., p. 36):

"But, surely it ought to require neither argument nor authority to support the proposition that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party."

The only differences that can be suggested between this case and the one at bar are first, that there the embezzlement preceded the deposit; and second, there the embezzlement and deposit occurred at the same place, while here they did not. These, however, are distinctions without a difference. That the acts occurred at different places instead of at the same place, again makes this a stronger case as compared with that.

The familiar cases of Louisiana *v.* Wood, 102 U. S., 294, and Chapman *v.* County of Douglas, 107 U. S., 348, though not cases of embezzlement, rest upon the same base in principle, that is to say, where money is paid upon an unauthorized contract, and applied to the use of the person entitled to receive it where the contract authorized, that person will be compelled to repay. And the same principle was again applied in Logan County Bank *v.* Townsend, 139 U. S., 67.

In Blanchard *v.* Commercial Bank, — U. S. App. —, 21 C. C. A., 319; 75 Fed., 249, a case where money had been borrowed for the use of a bank by its president, without authority delegated for that purpose, the court was pressed with the decision in the Western National Bank case to the effect that the bank was not bound by a loan made by its presi-

dent without special authority, and met this claim with the finding of the court below that the bank had received the benefit of the money borrowed, quoting from the opinion of the court below that the lending bank had placed the loan to the credit of the borrowing bank, from which it was drawn by the checks of the borrowing bank, as in the case at bar, upon which they say that the case is manifestly different from the Western National Bank case, and that:

"The distinction in the facts justifies the conclusion of the court in this case that the Commercial Bank is entitled to recover judgment, not upon the ground that Atkins was authorized by the directors of the Whatcom Bank to borrow the money, but upon the ground that it received and appropriated the same to its own use and benefit."

Perkins *v.* Boothby, 71 Maine, 91, presented this state of facts: The defendants were a corporation whose agent, Cleasby, without authority, borrowed money from the plaintiff, giving its notes therefor, and used the money borrowed to pay its debts. The directors of the corporation had no personal knowledge of the loan, notes, or application of the proceeds, until after the corporation had ceased to do business and gone into liquidation, when they repudiated both loan and notes, but left the appropriation of the proceeds undistributed. It was held that by thus retaining the benefit derived from the loan, the corporation became liable as for money had and received for the amount borrowed, with interest.

Another case in point is Bank of Lakin *v.* National Bank of Commerce, — Kan., —, 45 Pac., 587. The suit was brought by the National Bank of Commerce against the Bank of Lakin on two notes signed by the latter by its cashier. The

Bank of Lakin denied the authority of its cashier to borrow the money, and counter-claimed for collateral which had been sent with the notes and collected. The court below gave judgment for the plaintiff, finding that the money borrowed had been received by the Bank of Lakin, and that the only payment thereon had been from the collaterals. This finding was excepted to as not sustained by the evidence, which so far as appears from the report was only that the notes had come by mail, were discounted in regular course, credited to the Bank of Lakin, and the proceeds in part expressed to it, in part paid on its drafts, and in part sent to its Eastern correspondent for credit to it. The judgment was affirmed. There was a suggestion that the cashier had misappropriated part of the money by purchasing property with it in his own name; but the court said that the evidence supported the finding that the Bank of Lakin had actually received the money borrowed, and "if so, it would make no difference that its cashier had appropriated a part of the same to his own use. A principal cannot receive and retain the benefit of a transaction, and at the same time deny the authority of the agent by whom it was consummated."

Similar applications of the rule for which we are now contending will be found in some of the cases cited under other propositions, *supra*, and also in the following:

Bank of Commerce *v.* Bright, — U. S. App. —; 77 Fed. Rep., 949.

Chemical National Bank of Chicago *v.* City Bank of Portage, — Ill. —; 40 N. E., 328.

Johnston-Fife Hat Co. *v.* National Bank of Guthrie, — Okla. —, 44 Pac., 192.

Conn. River Savings Bank *v.* Fiske, 60 N. H., 363.

Thompson *v.* Bell, 10 Exch., 11.

Burke *v.* M. L. S. & W. Ry. Co., 83 Wisc, 410.

If we look at it from another point of view, the Little Rock Bank should be estopped. It is undisputed that Allis was at the time the credit was taken by him indebted to his bank on overdraft $10,678.44, besides at least $50,000 on notes, and was insolvent. This overdraft was paid by the credit he took. Whether any of the notes were paid is not disclosed. He was continuously thereafter indebted to the bank (Tr., pp. 64, 65). Had not this overdraft been paid in this way it is evident the bank could not have collected it, unless Allis and Denney had perpetrated a like fraud and gotten money in like manner from some other source. It is also shown that the McCarthy & Joyce Company notes were executed for the purpose of raising money to be placed to its credit at the bank to which the company was largely indebted (Tr., p. 61). It was therefore to the interest of the Little Rock Bank that the notes should be rediscounted, and at least to the extent of the overdraft, it got the benefit of the proceeds.

Lyon, Potter & Co. *v.* First Nat. Bank, 85 Fed. Rep., 120, 122, 123.

This is in line with the principle announced in People's Bank *v.* National Bank, 101 U. S., 181, where the notes were negotiated by the vice president and the proceeds applied in satisfaction of a debt which the maker of the notes owed the

bank, and it was held that the *bank* received and enjoyed the proceeds.

We are unable to appreciate the distinction which counsel endeavors to make between that case and the one at bar, when he asserts that there the bank, not its unauthorized officer, got the money. If an amount equal to the proceeds of the notes in this case was applied to the payment of Allis's indebtedness, or if the Little Rock Bank had the right to so apply them, there can be no difference in principle. Here at least part of the proceeds, according to contention of counsel, was applied to the indebtedness of Allis to the bank, and if all was not so applied it was the fault of the bank. To the extent the application was made to Allis's indebtedness the result is not different from that in the People's Bank case, in fact, and to the extent it might have been made the principle is the same; there the debtor of the bank got as much of the benefit of the proceeds of the notes as Allis did in this case.

X.

The receiver was not entitled to judgment for the balance to the credit of the Little Rock Bank on the books of the New York Bank at the time of the failure.

When the Little Rock Bank failed it had a balance to its credit on the books of the New York Bank of $467.86, against which the latter bank at their maturity charged the amount of the notes, leaving a balance due the New York Bank on the notes of $24,558.03 (Tr., p. 44). The receiver, in his answer, asked judgment against the New York Bank for the balance,

$467.86, to which that bank replied that it had applied the amount as a credit on the notes (Tr., p. 5). The receiver now claims that the court erred in refusing to render judgment in his favor for this amount, notwithstanding the fact it had been credited on the notes and the recovery by the New York Bank of the balance due on the notes.

There can be no question as to the right of the New York Bank to apply the balance towards payment of the notes.

Kentucky Flour Co. *v.* Merchants Nat. Bank, 13 S. W., 910.

1 Morse on Banking, secs. 337, 338.

Scott *v.* Armstrong, 146 U. S., 499.

Knight *v.* U. S. Savings Bank, 2 Mo. App., 563.

Yardly *v.* Clothier, 49 Fed. Rep., 337.

Yardly *v.* Clothier, 51 Fed. Rep., 506.

Adams *v.* Spokane Drug Co., 57 Fed. Rep., 888.

Counsel does not dispute this as an equitable right, nor does he deny that it may be pleaded under the Arkansas Code, but cites Scott *v.* Armstrong, *supra*, to sustain his contention that the right cannot be claimed by way of set-off in this case. While the court in that case expressed the opinion that such a right could not be pleaded as a set-off, it in fact allowed the defense and cited with approval the case of Yardly *v.* Clothier, 49 Fed. Rep., 337, where the set-off was allowed. In the case of Adams *v.* Spokane Drug Co., 57 Fed. Rep., 888, 890, the court also approving this case, and referring to Scott *v.* Armstrong, said:

"Considering what was done, notwithstanding what was said by the supreme court, I feel warranted in following Yardly *v.* Clothier."

In Scott *v.* Armstrong the receiver held notes against the maker, which became due after his appointment, and the maker pleaded as a set-off a balance due from the bank on open account. In the case at bar the New York Bank held the notes and was in the possession of the amount shown by its books to the credit of the Little Rock Bank. As indicated by some of the authorities, it had the right to enter the credit on the notes at the time of the failure. Certainly it had the right to make the application when the notes matured. The application having been made, it was a satisfaction of the balance, and was a good defense at law, either *in bar*—as was pleaded (Tr., p. 5)—or as a set-off.

Winder *v.* Caldwell, 14 How., 443, 444.

Partridge *v.* Phoenix Ins. Co., 15 Wall., 547, 549.

Schuyler *v.* Israel, 120 U. S., 506.

North Chicago Rolling Mill Co. *v.* St. Louis Ore and Steel Co., 152 U. S., 616.

Ainsworth *v.* Bank of California, 39 L. R. A., 686.

Re Hatch (N. Y.), 40 L. R. A., 664.

Respectfully submitted,

JOHN FLETCHER,

Attorney for Defendant in Error.

W. C. RATCLIFFE,

Of Counsel.